In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1942

No. 759

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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Subject Index

	Page
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Statement of the Case	3
Questions Presented	8
Reasons for Allowance of the Writ	10
Brief in Support of Petition for Writ of Certiorari	17
I.	
Decision of the Court Below	17
II.	
Jurisdiction	18
III.	
Statement of the Case	18
IV.	
Specification of Errors	18
V.	
Summary of the Argument	20
VI.	
Argument	20
A. The jurisdictional questions	20
B. The due process questions	28
C. Sufficiency of the evidence	34

Table of Authorities Cited

Cases	Pages
Cohens v. Virginia (1821), 6 Wheat. 264	13, 30
Consolidated Edison Co. v. N. L. R. B. (1938), 305 U. S. 197	13, 29
Cook County Nat. Bank v. U. S. (1882), 107 U. S. 445	27
Earle v. McVeigh (1876), 91 U. S. 503	30
Easton v. Iowa (1903), 188 U. S. 220	12, 26
Engel v. O'Malley (1911), 219 U. S. 128	11, 23
Farmers' and Mechanics' Nat'l Bank v. Dearing (1875), 91 U. S. 29	12, 25, 26
Fed. Land Bank v. Bismarck Lumber Co. (1941), 314 U. S. 95	12, 26
First Nat'l Bank of San Jose v. California (1922), 262 U. S. 366	12, 26
Ford Motor Co. v. N. L. R. B. (1938), 305 U. S. 364	13, 29
Hemphill v. Orloff (1928), 277 U. S. 537	11, 23
Hopkins v. U. S. (1898), 171 U. S. 578	11, 23
Inland Steel Co. v. N. L. R. B. (1940), 109 Fed. (2d) 9	13, 31, 32
M'Culloch v. Maryland (1819), 4 Wheat. 316	11, 12, 25, 26
Morgan v. United States (1937), 304 U. S. 1	13, 29
Morgan v. United States (1935), 298 U. S. 468	13, 29
N. L. R. B. v. Virginia E. & P. Co. (1941), 314 U. S. 469	14, 35, 36
Nathan v. Louisiana (1850), 8 How. 73	11, 23
New York Life Ins. Co. v. Cravens (1900), 178 U. S. 389	11, 24
New York Life Ins. Co. v. Deer Lodge County (1913), 231 U. S. 495	11, 24
Noble State Bank v. Haskell (1911), 219 U. S. 104	12, 25
Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio (1936), 301 U. S. 292	29
Osborn v. Bank (1824), 9 Wheat. 738	12, 25, 26
Paul v. Virginia (1869), 8 Wall. 168	11, 24

Pages

Schechter v. United States, 295 U. S. 495..... 22
Shallenberger v. First State Bank (1911), 219 U. S. 114....12, 25
Southern Steamship Company v. N. L. R. B. (1942), 316 U. S. 31, 86 L. Ed. Adv. 815..... 27

U. S. Fidelity and Guaranty Co. v. Kentucky (1913), 231 U. S. 395 .....11, 24

Ware & Leland v. Mobile County (1908), 209 U. S. 405.... 11

Codes and Statutes

Constitution:
Article I, Section 8(3) 5, 8, 19, 20
Article I, Section 8(18) 8, 9, 11, 12, 24
First Amendment 8, 10, 35
Fifth Amendment 8, 9, 29

Judicial Code, Section 240, as amended, 28 U. S. C. A. 347 (a) 2

National Bank Act, U. S. R. S. 5136, 12 U. S. C. A. Section 24 .....10, 21

National Labor Relations Act:
Sections 151 to 166, Title 29, U. S. C. A. Chapter 7.... 8
Section 2 (2) 4, 6, 9, 12, 19, 26
Section 2 (6) 4, 5, 8, 10, 18, 19, 20
Section 2 (7) 4, 5, 8, 10, 18, 19, 20
Section 6 (a) 30
Section 8, subsections (1) and (3) 3, 4, 20, 34
Section 10 (e) 2, 10

United States Supreme Court Rule 38, Paragraph 5 (b).... 2

Miscellaneous

House of Representatives Report No. 1147, 74th Congress, First Session (1935) 11, 21
House of Representatives, Proceedings and Report of Committee under House Resolution No. 258..... 28

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OCTOBER TERM, 1942

No.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),
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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner, Bank of America National Trust and Savings Association, a national banking association, respectfully prays that a writ of certiorari issue to review the decision and decree of the Circuit Court of Appeals for the Ninth Circuit entered in the above

cause, No. 9785 on the docket of said Court, on September 14, 1942, on petition of the National Labor Relations Board, hereinafter referred to as the Board, for an order of enforcement of its decision and order made and entered on August 4, 1939. A petition to the Court below for rehearing was denied on December 17, 1942 (2087).[1]

OPINIONS BELOW.

The order and decision of the Board is reported in 26 N. L. R. B. No. 23. A copy is contained in the record herewith at pages 157 to 188, inclusive. The opinion of the Circuit Court of Appeals is reported in 130 Fed. (2d) 624 and is contained in the record herewith at pages 2069 to 2082 inclusive. The opinion includes another case, No. 9784 on the docket of said Court, which was consolidated with this for hearing. Petitioner is filing concurrently its petition for a writ of certiorari in the other case, No. 9784.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended, 28 U. S. C. A. 347 (a), and Section 10 (e) of the National Labor Relations Act. Petitioner also relies on Rule 38, Paragraph 5 (b) of this Court for its grounds upon which this petition is made.

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[1]References are to pages of the case record No. 9785 in the Circuit Court.

STATEMENT OF THE CASE.

This case involves the discharge by petitioner, in September, 1937, of Paul Kovacich, Arthur Slattery, William Slattery, Thomas Rae Cochrane, Attilio Barbano, Edward McCarthy, John Marconi, William Nicholas, Mario Petrocchi, and Frank Ruggiero, hereinafter referred to as the Messengers. They were employed by petitioner as automotive messengers in the San Francisco area and their discharge was in connection with a change from the direct employment of messengers to a contract system (28-32).

On April 19, 1938, United Office & Professional Workers of America, Local No. 34 (C. I. O.), filed a charge with the Regional Director of the Board at San Francisco alleging unfair labor practices under Section 8, Subsections (1) and (3) of the Act in discharging the ten messengers and another employee. (Board's Exhibit 1-A, R. 1-3.) On August 10, 1938, the same union filed with the Regional Director of the Board an amended charge. (Board's Exhibit 1-B, R. 3-5.) The amended charge included the ten messengers and three other employees. On October 16, 1939, the same union filed a second amended charge including the ten messengers and the same three other employees. (Board's Exhibit 1-C, R. 6-8.) In the subsequent proceedings the charges in behalf of the three other employees were dropped and the case in the Court below involved only the ten messengers.

The Board issued its complaint on November 22, 1939, more than two years after the discharge of the messengers. (Board's Exhibit 1-D, R. 9-16.) On De-

cember 14, 1939, petitioner filed its special appearance and a motion to dismiss the proceeding on jurisdictional grounds. (Board's Exhibit 1-G, R. 44-51.) Reserving its defense that the Board was without jurisdiction, it answered the complaint on its merits. (Board's Exhibit 1-H, R. 18-42.)

The hearing before the Trial Examiner was concluded on January 9, 1940 (1978), and his intermediate report was made on March 23, 1940 (1976-2022). Petitioner filed with the Board its exceptions to the intermediate report on May 6, 1940 (163), objecting to the jurisdiction of the Board and to the findings and to rulings of the Trial Examiner (51-156).

The case was argued before the Board on June 4, 1940 (163). Its decision and order were filed on August 6, 1940. In its decision and order the Board found that petitioner was an employer within the meaning of Section 2 (2) of the Act, that it was engaged in commerce within the meaning of Section 2 (6) of the Act, that its operations affect commerce within the meaning of Section 2 (7) of the Act, and that it had engaged in unfair labor practices inhibited by Section 8 (1) and (3) of the Act (157-188).

Petitioner filed with the Board its exceptions to the decision and order and a motion to vacate the order and to reopen the case for further hearing (190-265). The Board denied the motion and petition, without hearing or notice, on October 22, 1940 (2022).

On April 1, 1941, the Board filed in the Court below its petition for an order of enforcement (266-273).

Petitioner filed its answer to the petition on June 12, 1941 (274-356).

Upon its first appearance petitioner filed its objections to the jurisdiction of the Board and denied that it was subject to the Act (44-50). Thereafter petitioner renewed and repeated its objections to the jurisdiction of the Board and moved that the case be dismissed for lack of such jurisdiction upon the following occasions:

When the hearing opened before the Trial Examiner (365-370); when the Board's evidence was in and before putting on any affirmative factual defense (1296-1305); at the close of the hearing by the Trial Examiner (1949-1950); in its exceptions to the intermediate report (51-58); upon the hearing of the case before the Board (70-78); and in its exceptions to the decision and order of the Board (190-265).

For the purposes hereof petitioner relies on the following defenses specifically pleaded and stated in its answer to the petition for enforcement in the Court below:

General Defenses.

1. The jurisdictional defense that the activities of petitioner as a national bank are not in commerce and do not affect commerce within the meaning and intent of Section 2(6) and 2(7) of the Act or Article I, Section 8(3) of the Constitution. (Answer—pp. 295-300, 311-313, 307, 317.)

2. The jurisdictional defense that petitioner as an agency and instrumentality of the United States is an excepted employer under Section 2(2) of the Act. (Id.)

3. The defense on the merits that the findings and conclusions of the Board are not supported by substantial evidence. (Answer—pp. 300-307, 308.)

4. The defense on the merits that the findings and conclusions of the Board rely for substantial support on expressions of opinion on the subject of unionization of bank employees which were not connected with the alleged unfair labor practices and without which support the findings and conclusions are supported by mere surmise and suspicion. (Specifications in answer —Nos. 9, 11, 12, 13, 14, 18, 19, 26 and 27 on pp. 302-304.)

5. The defense that the trial examiner denied to petitioner due process of law in refusing a subpoena to compel the attendance of witnesses and to produce evidence which petitioner deemed material to its defenses on factual issues and in refusing an offer of proof to the same end. (Answer—VI at page 315 and VII at page 316.)

Special Defense.

1. A special defense alleged on discovery of facts contained in a transcript of the proceedings and report of a Committee of the House of Representatives appointed by the Speaker of the House on July 20, 1939, under House Resolution No. 258 adopted on July 13, 1939, that the proceedings and conduct of the Board

in the other case No. 9784 in the Court below were so partial, unfair and predetermined and of continuing effect as to affect and motivate the proceedings of the Board and its decision in this case. (Answer—IV pp. 320-342, V pp. 342-354, VI p. 354.)

On December 30, 1941, petitioner filed in the Court below its petition and motion for the appointment of a special master to take evidence on the issue made by the special defense in its answer to the petition of the Board whether the proceedings of the Board were conducted in accordance with due process of law (2027-2058). The petition and motion were heard, argued and submitted on February 9, 1942 (2058-2059). In support of its motion at the time of the hearing petitioner filed with the Court below by its consent a transcript of the proceedings and report of the House Committee which contained evidence in support of said motion on the issue of due process (2059). On March 4, 1942, the Court below entered, without opinion, its order denying said petition and motion in the following terms:

"ORDER DENYING MOTION OF RESPONDENT, ETC.

"Upon consideration thereof, and by direction of the Court, It Is Ordered that the motion of respondent for appointment of a Special Master to take evidence on the issues raised by the affirmative defenses of respondent's answer and for other relief be, and hereby is denied.

"It Is Further Ordered that respondent file its brief on the merits in reply to petitioner's brief

within 30 days from date. (Wilbur, C.J. does not take part in this order because of illness.)" (2059).

On May 26, 1942, petitioner filed in the Court below its motion for trial of the issue of due process made by its answer to the petition for enforcement and gave notice thereof to the Board (2060-2062). The motion was heard and the case was argued on its merits and submitted in the Court below on June 5, 1942 (2068). In its opinion and decree made and filed on September 14, 1942, the Court below made no further reference to said motion and has made no ruling or order thereon[2] (2069-2085).

QUESTIONS PRESENTED.

The case arises under the National Labor Relations Act, hereinafter referred to as the Act, Title 29, U. S. C. A. Chapter 7, Sections 151 to 166. Petitioner also invokes and will rely upon the National Bank Act and upon Article I, Section 8 (3), Article I, Section 8 (18), and the First and Fifth Amendments of the Constitution.

Under Section 2 (6) and Section 2 (7) of the Act and Article I, Section 8 (3) of the Constitution, a question of jurisdiction has arisen in the case whether

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[2]The order of March 4, 1942, denying the motion for appointment of a special master also appears in the record at page 2067 but is an inadvertent duplication in printing of the order which appears at page 2059.[2]

the activities of petitioner as a national bank are in commerce or affect commerce.

Under Section 2 (2) of the Act and under Article I, Section 8 (18) of the Constitution a question of jurisdiction has arisen in the case whether petitioner is excluded as an employer subject to the Act by the exclusion of the United States as an employer.

Under the Fifth Amendment of the Constitution two questions have arisen in the case whether the proceedings of the Board and of the Court below were in accordance with or constituted due process of law.

The first question of due process is whether an instruction of the Chief Trial Examiner of the Board to its Trial Examiner in the companion case No. 9784 to accept doubtful evidence and to err in favor of the Board on jurisdictional issues was prejudicial to petitioner in both cases because it evidenced a continuing policy and predetermination of the Board to find that it had jurisdiction, and such predetermination would in the nature of things influence any Trial Examiner to decide facts adversely to petitioner in any other contemporaneous controversy on like issues.

The second question of due process which appears in this case and not in case No. 9784 in the Court below, is whether it was due process of law for the Trial Examiner to deny to petitioner a subpoena to obtain evidence which it deemed material to its defense. Involved in the same question is a question whether a rule of the Board which requires a respondent employer to make application for subpoenas and

to show cause therefor is fair and in due process of law while the same rule permits subpoenas to be issued on request of the Board without imposing the same burden of showing the reason therefor.

Under the First Amendment of the Constitution a question has arisen in the case whether petitioner, if it is an employer subject to the Act, is to suffer penalty thereunder for expressing opinions on the subject of unionization of bank employees, if such expressions were not used coercively or to intimidate its employees.

Under Section 10 (e) of the Act a question of fact and law has arisen in the case whether the findings of the Board depending for support in a large measure on expressions of opinion are supported by substantial evidence.

REASONS FOR ALLOWANCE OF THE WRIT.

1. In holding that the activities of petitioner as a national bank are in commerce or constitute commerce within the intent of Section 2 (6) of the Act, and that its activities affect commerce within the intent of Section 2 (7) of the Act, the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. The question involves not only the relation to commerce of the general activities of banking but also the intent of the National Bank Act (U. S. R. S. 5136, 12 U. S. C. A. Sec. 24) and the intent of the National Labor Relations Act as dis-

closed by House of Representatives Report No. 1147 of the 74th Congress (1935).

2. In holding that particular banking activities of petitioner are in commerce or constitute commerce the Circuit Court of Appeals has decided important questions of federal law probably in conflict with applicable decisions of this Court.

Hemphill v. Orloff (1928), 277 U. S. 537;
Engel v. O'Malley (1911), 219 U. S. 128;
Ware & Leland v. Mobile County (1908), 209 U. S. 405;
Hopkins v. U. S. (1898), 171 U. S. 578;
Nathan v. Louisiana (1850), 8 How. 73;
U. S. Fidelity and Guaranty Co. v. Kentucky (1913), 231 U. S. 395.

See also other transactions which are held to be only incidental to commerce:

New York Life Ins. Co. v. Deer Lodge County (1913), 231 U. S. 495;
New York Life Ins. Co. v. Cravens (1900), 178 U. S. 389;
Paul v. Virginia (1869), 8 Wall. 168.

3. In holding that the activities of petitioner as a national bank may be regulated under the commerce powers, the Circuit Court of Appeals has decided an important question of federal law in a way which is probably in conflict with applicable decisions of this Court which hold that the power to create and regulate national banks is contained in Article I, Section 8 (18) of the Constitution.

M'Culloch v. Maryland (1819), 4 Wheat. 316;

Osborn v. Bank (1824), 9 Wheat. 738;
Farmers' and Mechanics' Nat'l Bank v. Dearing (1875), 91 U. S. 29.

4. In holding that activities of the kind in which petitioner is engaged may be regulated under the commerce powers, the Circuit Court of Appeals has decided an important question of federal law in a way which is probably in conflict with decisions of this Court which hold that the several states may create and regulate banks under their police powers.

Noble State Bank v. Haskell (1911), 219 U. S. 104;
Shallenberger v. First State Bank (1911), 219 U. S. 114.

5. In holding that petitioner is an employer within the intent of Section 2 (2) of the Act, which excludes the United States as an employer, and by necessary implication excludes its instrumentalities, the Circuit Court of Appeals has decided an important question of Federal law in a way which is probably in conflict with applicable decisions of this Court.

Fed. Land Bank v. Bismarck Lumber Co. (1941), 314 U. S. 95;
First Nat'l Bank of San Jose v. California (1922), 262 U. S. 366;
Easton v. Iowa (1903), 188 U. S. 220;
Osborn v. Bank (1824), 9 Wheat. 738;
M'Culloch v. Maryland (1819), 4 Wheat. 316;
Constitution, Art. I, Sec. 8 (18).

6. In denying petitioner's motion for the appointment of a Special Master or other appropriate means

to take evidence in support of its defense that the proceedings of the Board and its Trial Examiner were not in due process of law, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

Morgan v. United States (1937), 304 U. S. 1;
Morgan v. United States (1935), 298 U. S. 468.

7. In failing to pass upon petitioner's motion for leave to introduce evidence in support of its defense that the proceedings of the Board and its Trial Examiner were not in due process of law, the Circuit Court of Appeals denied to petitioner due process of law and has so departed from the usual and accepted course of jurisdictional proceedings as to call for the exercise by this Court of its power of supervision.

Ford Motor Co. v. N. L. R. B. (1938), 305 U. S. 364;
Consolidated Edison Co. v. N. L. R. B. (1938), 305 U. S. 197;
Cohens v. Virginia (1821), 6 Wheat. 264.

8. In affirming the order of the Trial Examiner refusing petitioner's request for a subpoena to compel the attendance of witness and to produce evidence which it deemed material to its defenses, the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

Inland Steel Co. v. N. L. R. B. (1940), 109 Fed. (2d) 9.

9. In holding that the findings of the Board, which rest for their substantial support on expressions of

opinion, are supported by evidence, the Circuit Court of Appeals has decided an important federal question in a way which is probably in conflict with another applicable decision of this Court.

N. L. R. B. v. Virginia E. & P. Co. (1941), 314 U. S. 469.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court in the case numbered 9785 on its docket and entitled "National Labor Relations Board, Petitioner, v. Bank of America National Trust & Savings Association, Respondent", to the end that said cause may be reviewed and determined by this Court as provided by the statutes of the United States, and for such other and further relief as may be proper.

Dated, San Francisco, California,
February 17, 1943.

HERBERT W. ERSKINE,
EDMUND NELSON,
G. D. SCHILLING,
LOUIS FERRARI,
Counsel for Petitioner.

KENNETH M. JOHNSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the petitioner's counsel in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
February 17, 1943.

HERBERT W. ERSKINE,
Counsel for Petitioner.

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OCTOBER TERM, 1942

No.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.
DECISION OF THE COURT BELOW.

The decision of the Circuit Court of Appeals is reported in 130 Fed. (2d) 624 and is printed in the record herewith at pages 2069-2085.

II.

JURISDICTION.

A statement of the basis on which this Court has jurisdiction to grant the writ is set forth at page 2 of the petition herewith.

III.

STATEMENT OF THE CASE.

For the purposes hereof petitioner relies upon and will use the statement of the case on pages 3 to 8, inclusive, of the petition herewith.

IV.

SPECIFICATION OF ERRORS.

Petitioner submits that the Circuit Court of Appeals erred in the following particulars:

1. In holding that the activities of petitioner in performing its limited functions as a national bank are in commerce and affect commerce within the intent of Section 2 (6) and (7) of the Act.

2. In holding that particular activities of petitioner are in commerce or affect commerce under Section 2 (6) and (7) of the Act and that jurisdiction of the Board may be found from transactions which are used in and necessary for the accumulation, transfer and exchange of, and for other dealings in money.

3. In giving to Section 2 (6) and (7) of the Act an effect beyond the intent of Article I, Section 8 (3) of the Constitution by confusing matters which are merely incidental to commerce with the tangible realities and objects of commerce.

4. In confusing money and its use as the basis of credit with commodities of commerce.

5. In holding that petitioner as a national bank is not an excepted employer under Section 2 (2) of the Act which excludes the United States as an employer and, by necessary implication, excludes its instrumentalities.

6. In denying to petitioner by its order of March 4, 1942, the appointment of a special master or other means to obtain evidence on the issue made by petitioner's special defense that the proceedings and conduct of the Board and its Trial Examiner were prejudicial and unfair and not in due process of law.

7. In failing to pass upon petitioner's motion and request for leave to introduce evidence on the issues of due process made by petitioner's special defense, and by such failure, denying to petitioner a fair and impartial hearing by said Court in due process of law.

8. In affirming the ruling of the Trial Examiner by which petitioner was denied a subpoena to compel the attendance of witnesses and the production of evidence which it deemed material to its defenses.

9. In affirming the findings and conclusions of the Board, that petitioner committed the acts inhibited by

Section 8 (1) and (3) of the Act without the support of substantial evidence.

10. In affirming the findings and conclusions of the Board, which rely for their main support on expressions of opinion not connected with the acts charged and are otherwise without the support of substantial evidence.

V.

SUMMARY OF THE ARGUMENT.

The argument will discuss the federal and procedural questions and the conflict of decisions applicable to (a) the jurisdictional issues, (b) the questions of due process, (c) whether there is evidence to support the findings. It will follow the order and substance of the Reasons for Allowance of the Writ stated in the petition herewith.

VI.

ARGUMENT.

A. THE JURISDICTIONAL QUESTIONS.

(1) The power of the Congress to regulate commerce flows from Article I, Section 8 (3) of the Constitution. The intent of Section 2 (6) and (7) of the National Labor Relations Act is limited by the intent of the Constitution. Petitioner is a national banking association and its powers flow from and are limited by the National Bank Act. In granting and limiting

the corporate powers of national banks the Congress expressly defined its conception of the business of banking in the following terms:

> "Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title. * * *"
>
> *U. S. R. S.* 5136, 12 U. S. C. A., Sec. 24.

We find light on the wording and intent of the Act in House of Representatives Report No. 1147, 74th Congress, First Session (1935). We quote from the report at page 10:

> "The definitions in subsections 6 and 7 are intended as the basic jurisdictional definitions as used in their appropriate setting in Sections 9 and 10. The bill is based squarely on the power of Congress to regulate commerce among the several states and with foreign nations. It does not apply to controversies or practices of purely local significance, which do not presently or potentially burden or obstruct the free flow of such commerce.
>
> The Committee Amendment to subsection 6 narrows the definition of interstate commerce by not making it extend to transportation or communication that is merely 'related to' interstate commerce. This change has been made in view of the

doubts that the Schechter Case casts upon the validity of regulating practices that are merely 'related to' or 'indirectly' interstate commerce.

The new definition inserted by the Committee Amendment to subsection 7 also helps to confine the bill to the proper sphere under the Schechter decision by removing from its purview practices which merely 'affect' interstate commerce. Under this Amendment the bill is confined to practices 'burdening or obstructing' interstate commerce. These words have received repeated recognition in court decisions as fit bases for Federal jurisdiction."

In *Schechter v. United States,* 295 U. S. 495, this Court, in a unanimous opinion written by Chief Justice Hughes, said:

"In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle * * * If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

It is obvious that the Constitutional intent and the Congressional intent are federal questions which, in their relation to the purposes and activities of national banks, have never been fully, but ought to be decided by this Court. These questions are of great public interest and of paramount importance to all banking institutions, and to the national monetary and fiscal policies and they should be settled.

(2) In its decision the Circuit Court of Appeals finds that particular activities of petitioner are in commerce or affect commerce, and, on that assumption, that its labor relations are subject to regulation under the Act. The decision is probably in conflict with decisions of this Court which hold that activities and transactions of various kinds common to all banking are not in commerce but only incidental to commerce, e.g.:

Dealing in negotiable notes is not commerce.
Hemphill v. Orloff (1928), 277 U. S. 537.

Accepting and accumulating deposits of money for transfer to foreign countries is not commerce.
Engel v. O'Malley (1911), 219 U. S. 128.

Receiving and transmitting bills of lading with drafts for collection of money is not commerce but only incidental to commerce.
Hopkins v. U. S. (1898), 171 U. S. 578.

Buying and selling foreign-exchange is not commerce.
Nathan v. Louisiana (1850), 8 How. 73.

The supplying of credit information is not commerce.

U. S. Fidelity & Guaranty Co. v. Kentucky (1913), 231 U. S. 395.

Execution of life insurance policies, which are private contracts, as are most of the contracts used in banking, is not commerce.

New York Life Ins. Co. v. Deer Lodge County (1913), 231 U. S. 495;

New York Life Ins. Co. v. Cravens (1900), 178 U. S. 389;

Paul v. Virginia (1869), 8 Wall. 168.

The conflict requires a review of the case by this Court.

(3) In its decision that the activities of petitioner as a national bank may be regulated under the commerce powers the Circuit Court of Appeals has decided an important question of federal law which is probably in conflict with applicable decisions of this Court which hold that the power to create and regulate national banks is contained in Article I, Section 8 (18) of the Constitution.

The power to create national banks and to confer upon them special privileges and immunities was bitterly contested by the states. This Court found the power to create such banks in Article I, Section 8 (18) of the Constitution. Under the powers therein found this Court held that the Congress could create such banks to aid other important needs and objects of the Federal Government. Up to this time there has been

no decision holding that any power of creation or regulation exists under the commerce clause.

Farmers' and Mechanics' Nat. Bank v. Dearing (1875), 91 U. S. 29;
Osborn v. Bank (1824), 9 Wheat. 738;
M'Culloch v. Maryland (1819), 4 Wheat. 316.

Although larger in scope, the nature and incidents of banking have not materially changed from their character when these cases were decided. The decision of the Circuit Court of Appeals seems to overrule the logic of these decisions and the conflict requires that the case be reviewed by this Court.

(4) In holding that activities of the kind in which petitioner is engaged may be regulated under the commerce powers the Circuit Court of Appeals has decided an important question of federal law in a way which is probably in conflict with the following applicable decisions of this Court which hold that the several states may create and regulate banks under their police powers:

Noble State Bank v. Haskell (1911), 219 U. S. 104;
Shallenberger v. First State Bank (1911), 219 U. S. 114.

If the power to regulate banks exists under the commerce clause, the Congress may, at any time, assume entire control of all banking to the exclusion of the several states. The question is of the highest importance, not only to banks, but to the several states and to the people. The decision is probably in conflict with the opinion of this Court in the cited cases that the

power of the federal government and the power of the states to create and regulate banks is concurrent, but one flows from the Constitution while the other has always resided in the police powers of the several states. These considerations require that the case be reviewed by this Court.

(5) In holding that petitioner is an employer within the intent of Section 2 (2) of the Act, which excludes the United States, and, by necessary implication, excludes its instrumentalities, the Circuit Court of Appeals has decided an important question of federal law which is probably in conflict with the following applicable decisions of this Court.

Federal Land Bank v. Bismarck Lumber Co. (1941), 314 U. S. 95;

First Nat'l. Bank of San Jose v. California (1922), 262 U. S. 366;

Easton v. Iowa (1903), 188 U. S. 220;

Farmers' and Mechanics' Nat'l. Bank v. Dearing (1875), 91 U. S. 29;

Osborn v. Bank (1824), 9 Wheat. 738;

McCulloch v. Maryland (1819), 4 Wheat. 316.

Other decisions of this Court are to the same effect but these cases are leading and persuasive.

In *Easton v. Iowa* (1903), 188 U. S. 220, this Court said:

> "* * * Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations;"

The Act under which national banks are organized constitutes a complete system for their government. *Cook County Nat. Bank v. U. S.* (1882), 107 U. S. 445. Nothing in the National Labor Relations Act refers to or attempts to regulate national banks under the commerce powers. In considering the objectives of the National Bank Act and of the National Labor Relations Act, it is a reasonable assumption, justified by the decisions of this Court, that when the Congress excluded the United States as an employer under the Act it meant to exclude an instrumentality of such character as a national bank. In holding the contrary, the Board, and the Circuit Court of Appeals in affirming the order, have adopted a single-minded view. On that subject this Court said in *Southern Steamship Company v. N. L. R. B.* (1942), 316 U. S. 31, 86 L. Ed. Adv. 815:

> "* * * It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

The conflict requires a review by this Court.

B. THE DUE PROCESS QUESTIONS.

1. The proceeding in the Circuit Court of Appeals is original and is in equity. In its answer to the petition for enforcement petitioner brought forth facts disclosed by an important public document (Proceedings and Report of Committee of the House of Representatives under House Resolution No. 258) which make a strong showing of failure of due process in the proceedings of the Board in the *Washer* case, which was consolidated with this case for hearing in the Court below. The charge of the union was on file with the Board in this case while the *Washer* case was on trial and pending before the Board. If the mind of the Board was closed, unfair and partial in one case, it was in the other. Its Trial Examiners knew and gave effect to its policies in both cases. The findings in the Report of the House of Representatives and their effect are set forth at length in petitioner's answer. (320 to 354.) The disclosures of the House Committee shock good conscience in a judicial proceeding.

The Board has not denied the disclosures of the House Committee. A copy of its Proceedings and Report was exhibited to and filed with the Court below and the Court was apprised of its contents (2059). It denied petitioner's motion for the appointment of a special master or other means to inquire judicially into the disclosures, which clearly showed a failure of due process. It expressed no opinion on the merits of the motion (2059).

The order of the Court below denying petitioner's motion is probably in conflict with the views expressed by this Court in several decisions including:

Morgan v. United States (1937), 304 U. S. 1;

Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio (1936), 301 U. S. 292;

Morgan v. United States (1935), 298 U. S. 468.

Whether the proceedings of the Board and of the Court below were in due process of law is a federal question under the Fifth Amendment of the Constitution. The case should be reviewed by this Court on that ground.

2. Before submitting its argument on the jurisdictional and factual issues of the case petitioner moved the Court below for leave to introduce evidence in support of its special defense on the issues of due process (2060-2061). The Board opposed the motion on the ground that the Order of March 4, 1942, on the motion to appoint a special master, precluded the motion for trial of these issues (2062-2066). In its decision on the merits the Court below made no reference to the motion and has made no order thereon. It is submitted that this was not due process in the Court below. It was a departure from the usual course of judicial proceedings which calls upon this Court to exercise its power of supervision.

Ford Motor Co. v. N. L. R. B. (1938), 305 U. S. 364;

Consolidated Edison Co. v. N. L. R. B. (1938), 305 U. S. 197;

Cohens v. Virginia (1821), 6 Wheat. 264;
Earle v. McVeigh (1876), 91 U. S. 503.

3. In its answer to the petition for enforcement (315-316) petitioner pleaded as special defenses error and misconduct of the Trial Examiner in refusing a *subpoena duces tecum* (1307-1321); in denying petitioner's offer of proof (1318-1321), and in refusing petitioner's demand for production of written statements of complaining employees, which statements were in the Board's possession. (1318, Exception 5 to the Intermediate Report, 61.)

Section 6(a) of the Act provides as follows:

> "The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe."

Section 21 of the Rules and Regulations of the Board provides for the attendance of witnesses, the production of evidence, and the issuance of subpoenas, as follows:

> "Any member of the Board may issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents that relate to any matter under investigation or in question, before the Board, its member, agent, or agency, conducting the hearing or investigation. Applications for subpenas may be filed by any party prior to the hearing with the Regional Di-

rector. The Regional Director may grant or deny the application, or may refer it to the Trial Examiner, who may thereafter grant or deny the application. Application for subpenas made during the hearing shall be made to the Trial Examiner who may grant or deny the application. Such applications shall be timely, and shall specify the name of the witness and the nature of the facts to be proved by him, and, if calling for documents, must specify the same with such particularity as will enable them to be identified for purposes of production."

It cannot be disputed that the power of an administrative board to make rules and regulations is a power to be exercised within the limitations of the enabling law. The Act does not provide that the Board may, in its discretion, refuse a subpoena. The subpoena requested by respondent was not resisted on the ground that it was untimely. The witnesses whose presence it sought were present or immediately available and the records were in their possession or in the possession of counsel for the Board.

The provision in the Rules and Regulations of the Board requiring employers to make written application for subpoenas and to specify therein the nature of the facts to be proved, whereas, subpoenas on behalf of the complainants are issued by the Board of its own motion without application or showing, is unfair and discriminatory.

The Circuit Court of Appeals for the Seventh Circuit so held in the case of *Inland Steel Co. v. N. L.*

R. B. (1940), 109 Fed. (2d) 9. The Court said at page 18:

> "Another ground upon which petitioner argues it was deprived of a full and fair hearing is that it was denied the privilege of ordinary witness subpoenas. At the outset of the hearing, the Trial Examiner ruled that such subpoenas would be issued to petitioner only upon written application containing specifications of 'the name of the witness and the nature of the facts to be proved'. The Board takes the position that this ruling of the Examiner was in compliance with Article II, Section 21 of the Rules and Regulations of the Board. Petitioner's position is that this rule, when fairly construed, has application only to subpoenas duces tecum and not ordinary subpoenas. We do not think the rule is susceptible of such construction—in fact, it plainly reads otherwise. The Board also argues that the rule does not apply to it because it is not a party to the proceedings. We do not think it is necessary for us to determine whether or not this position is sound. The fact is, the rule was not applied to counsel for the Board and, therefore, he was not required to file such application. When petitioner raised the question early in the hearing, counsel for the Board stated: 'That the rules and regulations do not provide that the Board must apply to itself for subpoenas; that to construe the rules in that manner would be ridiculous; and that for both of those reasons the practice is that the Board does not apply to itself for subpoenas.'
>
> "Assuming that counsel for the Board correctly appraised the situation, and we think it did, it

discloses the unfairness of the procedure employed. It also illustrates, in a minor fashion, what this record, as a whole, convincingly discloses—that is, the danger of imposing upon a single agency the multiple duties of prosecutor, judge, jury and executioner. The further assumption that the ruling of the Trial Examiner was in compliance with the Board's rule, does not improve the situation—it merely shows the rule itself is unfair and discriminatory."

* * * * * * *

"It is further argued by the Board that petitioner's complaint is without merit because there is no showing that evidence favorable to it was excluded. This argument begs the question. We are not now considering the extent to which petitioner was prejudiced, but whether it was, by such procedure, deprived of a substantial right, or whether the procedure employed placed it at a disadvantage in contrast with its opponent. It is also argued that the rule is reasonable because petitioner, under Section 10(e) of the Act, has a right to make application to this court to adduce additional evidence. This argument also is not tenable. Such provision has no bearing upon what we regard as an unreasonable and unfair restriction upon petitioner's right to the process of subpoena."

The rule of the Board for the issuance of subpoenas is in itself discriminatory. Its application in this case was a denial of due process and equal opportunity under the law. By it petitioner was denied the right

to offer the evidence and to argue its materiality before the Trial Examiner. The question of materiality was determined by the denial of the subpoena without a hearing. We have here not only a discriminatory rule but a discriminatory application of the rule.

The vice in the Trial Examiner's ruling on the application for the subpoena extends also to his refusal of the offer of proof and to the demand of petitioner for production of the written statements of the complaining employees. It was equivalent to a refusal to permit petitioner to produce evidence which might be material to its defense. If the evidence, when produced or offered, were found to be immaterial, the Trial Examiner could exclude it. But it was prejudicial error to refuse petitioner the opportunity of any process or means to obtain the evidence for the purpose of offering it.

The Circuit Court of Appeals affirmed the ruling of the Trial Examiner (2081). Its decision is in conflict with the decision in the Seventh Circuit. A review by this Court is required to settle the law.

C. SUFFICIENCY OF THE EVIDENCE.

1. The Board rested its finding that petitioner committed the acts inhibited by Section 8 (1) and (3) of the Act largely upon expressions of opinion and detached oral comments of other employees and officers of petitioner which only by guesswork can be con-

sidered to have had any connection with the acts charged.

Expressions of opinion upon which the Board relied to support its findings appear in the record at pages 1741, 574, 577, 547, 592-3, 769, 973, 949, 1261-2. The Court below adopted the findings of the Board (2075).

The decision is probably in conflict with the decision of this Court in *N. L. R. B. v. Virginia E. & P. Co.* (1941), 314 U. S. 469. A federal question arises under the First Amendment of the Constitution whether expressions of opinion on a question of such social and economic import as the unionization of bank employees may be used as evidence to convict an employer of unfair labor practices unless the opinions expressed were clearly connected with the acts charged. The question requires mature consideration and a review by the Court.

2. The Board looked for support of its findings to expressions of opinion of Thomas McCullough in a conversation with Angela Gizzi Ward, a witness for the Board. (Board Findings, p. 169; testimony of Angela Gizzi Ward at pages 1261-1262.) She testified as follows:

> "Mr. McCullough made the statement that in his opinion the Union made a great mistake when it went C I O and then stated that the C I O would not get anywhere because there were too many Communists in the C I O, too many radicals." (1261.)

The evidence discloses (1262) that the witness and McCullough were having a social conversation. His statement was detached and had nothing to do with the discharge of ten messengers.

R. A. Schacht was a clerk in charge of about fifteen bookkeepers at one of petitioner's branches (590). The bookkeepers took steps to join a union and then withdrew after talking to Schacht who told them that in his opinion unionization of bank employees would stagnate their positions and salaries (592-593).

There is no evidence that Schacht had any authority to speak for petitioner, nor anything more than that his views were his own, or that he knew about the ten messengers, or that in point of time and place, his opinions had anything to do with their discharge.

The Court below accepted the view of the Board that what Schacht said supported the findings. But the extent and degree in which the findings rely on such detached and off-hand opinions as we have quoted, and on other facts and circumstances, are not disclosed by the Board's decision.

The finding which depends for support on expressions of opinion, most of which appear to be innocent and detached, is subject to the vice which this Court found in *N. L. R. B. v. Virginia E. & P. Co.* (1941), 314 U. S. 469. The decisions are probably in conflict and the case should be reviewed by this Court.

It is respectfully submitted that the petition should be granted.

Dated, San Francisco, California,
February 17, 1943.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute	3
Statement	3
Argument	12
Conclusion	22
Appendix	23

CASES CITED

Associated Press v. *National Labor Relations Board*, 301 U. S. 103	15
Bethlehem Steel Co. v. *National Labor Relations Board*, 120 F. (2d) 641	20
Board of Trade v. *Olsen*, 262 U. S. 1	14
Champion v. *Ames*, 188 U. S. 321	16
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197	14
Electric Bond & Share Co. v. *Securities and Exchange Commission*, 303 U. S. 419	15
Federal Radio Comm. v. *Nelson Bros. Co.*, 289 U. S. 266	16
Gibbons v. *Ogden*, 9 Wheat. 1	15
Goldman v. *United States*, 316 U. S. 129	19
Indiana Farmer's Guide Publishing Co. v. *Prairie Farmer Publishing Co.*, 293 U. S. 268	16
Inland Steel Corp. v. *National Labor Relations Board*, 109 F.(2d) 9	21
International Textbook Co. v. *Pigg*, 217 U. S. 91	16
McCulloch v. *Maryland*, 4 Wheat. 316	17
National Labor Relations Board v. *Acme-Evans Co.*, 130 F. (2d) 477, certiorari denied, March 1, 1943, No. 681, this Term	21
National Labor Relations Board v. *Air Associates*, 121 F. (2d) 586	20
National Labor Relations Board v. *Blackstone Mfg. Co.*, 123 F. (2d) 633	21
National Labor Relations Board v. *Chicago Apparatus Co.*, 116 F. (2d) 753	18
National Labor Relations Board v. *Condenser Corp.*, 128 F.(2d) 67	21
National Labor Relations Board v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756	21

516399—43——1

	Page
National Labor Relations Board v. *Ford Motor Co.*, 114 F. (2d) 905, certiorari denied, 312 U. S. 689	20
National Labor Relations Board v. *Ed. Friedrich, Inc.*, 116 F. (2d) 888	21
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1	13
National Labor Relations Board v. *Stackpole Carbon Co.*, 105 F. (2d) 167, certeriorari denied, 308 U. S. 605	20
National Labor Relations Board v. *Virginia Electric & Power Co.*, 314 U. S. 469	18
Newton v. *Consolidated Gas Co.*, 258 U. S. 165	20
Noble State Bank v. *Haskell*, 219 U. S. 104	14
North Whittier Heights Citrus Association v. *National Labor Relations Board*, 109 F. (2d) 76, certiorari denied, 310 U. S. 632	20
Pensacola Tel. Co. v. *Western Union Tel. Co.*, 96 U. S. 1	16
Stafford v. *Wallace*, 258 U. S. 495	14
United States v. *Ferger*, 250 U. S. 199	16
United States v. *General Motors Corp.*, 121 F. (2d) 376, certiorari denied, 314 U. S. 618	15
United States Shipping Board Emergency Fleet Corp v. *Western Union Telegraph Co.*, 274 U. S. 415	17
United States v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533	14
Wickard v. *Filburn*, No. 59, decided Nov. 9, 1942	14
Statute:	
National Labor Relations Act:	
Section 2 (2)	23
Section 2 (6)	23
Section 2 (7)	24
Section 7	24
Section 8 (1)	24
Section 8 (3)	24
Section 10 (e)	25
Miscellaneous:	
S. 2926, 73d Cong., 2d sess	16
S. Rep. No. 1184, 73d Cong., 2d sess	16

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 759

BANK OF AMERIAA, NATIONAL TRUST AND SAVINGS ASSOCIATION, CALIFORNIA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 2069–2082) is reported in 130 F. (2d) 624. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 157–188) are reported in 26 N. L. R. B. 198.[1]

[1] The opinion of the court below, in addition to enforcing the order of the Board which is reported in 26 N. L. R. B. 198, also enforced another order of the Board which is reported in 14 N. L. R. B. 207, separate petitions to enforce the respective Board orders having been consolidated in the

JURISDICTION

The decree of the circuit court of appeals (R. 2082–2085) was entered on September 14, 1942. A petition for rehearing filed by petitioner was denied on December 17, 1942 (R. 2087). The petition for a writ of certiorari was filed on February 23, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the unfair labor practices of the fourth largest bank in the United States affect commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Whether a national banking association is "the United States" and accordingly not an employer subject to the Act within the meaning of Section 2 (2).

3. Whether there is substantial evidence to support the Board's findings that petitioner restrained, coerced, and interfered with its employees in the exercise of their organizational rights and discriminatorily discharged 10 of its em-

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court below. Petitioner has, however, filed a separate petition for certiorari respecting each Board order, the petition in the instant case being limited to the order reported in 26 N. L. R. B. 198, and the petition in *Bank of America National Trust and Savings Association* v. *National Labor Relations Board*, No. 758, this Term, filed February 23, 1943, being limited to the order reported in 14 N. L. R. B. 207.

ployees in violation of Section 8 (1) and (3) of the Act.

4. A question urged by petitioner, but which we think is not properly presented, is whether the Board's order abridged petitioner's freedom of speech in violation of the First Amendment.

5. Whether the Board's refusal of subpoenas for the production of immaterial evidence or privileged documents constitutes a denial of due process.

6. Whether the court below erred in refusing leave to petitioner to adduce evidence in the instant case, heard some 18 months after No. 758 and before a different Trial Examiner, concerning a claimed denial of due process in No. 758 based upon an alleged improper relationship between the Trial Examiner and other Board agents.

STATUTE

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 23–25.

STATEMENT

After appropriate proceedings, the Board on August 6, 1940, issued its findings of fact, conclusions of law and order (R. 157–188). The Board's findings of fact with respect to petitioner's operations are based upon uncontradicted evidence. The facts as found by the Board and

shown by the evidence may be summarized as follows:[2]

1. Commerce

Petitioner is a national banking association organized under the laws of the United States, with its main office in San Francisco, California, 495 branches in 307 California communities, and a branch in London, England (R. 163; 373, Bd. Exhs. 2a, 2d, 4e, 5d). As of December 31, 1937, its total resources amounted to approximately $1,574,000,000. It is the ninth largest bank in the world and the fourth largest in the United States (R. 163; Bd. Exhs. 2a, 3g, 4c).

In 1937, petitioner made loans to corporations, partnerships and individuals amounting to more than 629 million dollars (R. 164; Bd. Exh. 5k). One half of petitioner's loan portfolio of 700 million dollars in July 1939 was composed of commercial loans, of which approximately 105 million dollars constituted consumer credit issued to finance the purchase of automobiles, household equipment, and similar consumer goods, and 250 million dollars were loans to corporations, partnerships and individuals in all lines of business including petroleum production and refining, food canning and processing, lumbering and logging, mining, clothing, transportation and the manufacture of transportation equipment, newspapers

[2] In the following statement the references preceding the semicolons are to Board findings and the succeeding references are to supporting evidence.

and publishing, and stock exchange brokerage (R. 164; 1293–1295, 421–427).

On December 31, 1937, petitioner had an outstanding liability of nearly 24 million dollars for letters of credit, acceptances and foreign bills, on which it was either acceptor, endorser or maker (R. 164; Bd. Exh. 5a, 5b). During 1937 petitioner executed acceptances of more than 34 million dollars and purchased acceptances of other banks payable in States other than California of more than 17 million dollars. During 1938 the comparable figures were 46 million and 6 million dollars, respectively (R. 164; 412–413). As of June 30, 1938, petitioner maintained deposits in New York, Chicago, and other cities and had cash items in process of collection, amounting to over 82 million dollars (R. 164–165; Bd. Exh. 5c). As of December 31, 1938, petitioner held deposits from banks outside the State of California in the amount of 30 million dollars (R. 165; 444).

In 1937 petitioner sent to out-of-State banks from its Los Angeles and San Francisco offices, notes, drafts, bills, and coupons for collection outside of California in the amount of 157 million dollars, of which at least half were drafts covering bill of lading shipments of commodities to points outside the State of California or to foreign countries (R. 165; 449, 512).[3] During 1937 peti-

[3] During 1938 petitioner collected checks approximating the amount of one and a quarter billion dollars, of which 415 million dollars' worth were received for collection from other banks (R. 448–449).

tioner made telegraphic transfers of money to points outside the State of California in the amount of more than 463 million dollars and received telegraphic transfers of money from banks outside the State of California in the sum of over 606 million dollars (R. 165; 1287). In the same year it purchased more than 96 million dollars worth of foreign exchange, and sold in excess of 12 million dollars worth of travellers' cheques[4] and letters of credit (R. 165; 467–468, 1287–1288).

Petitioner's branch in London, England, handles the accounts of many California companies which do business abroad and finances shipments of commodities between England and the United States (R. 165–166; 1288).

Upon the basis of the above facts the Board found that petitioner's unfair labor practices affected commerce within the meaning of the Act (R. 181, 185).

2. Unfair Labor Practices

The Board's findings of fact relating to the unfair labor practices and the evidence in support thereof may be summarized as follows:

Beginning in the spring of 1937, various unions launched among petitioner's employees competing membership campaigns which came to petitioner's

[4] Petitioner's travellers' cheques may be purchased in some 31 foreign countries and in many States of the United States (R. 165; Bd. Exh. 6).

notice (R. 165–168; 516–532, 555–559, 1571–1572, 1936, 1005). Confronted with these organizational efforts, petitioner expressed its hostility to unionism as well as its conviction that the Act was not applicable to it (R. 168; 571, 574, 577–578, 579, 1007, 1741).

During the course of the organizational campaign one of petitioner's officials asserted that the charging union should not have joined the Congress of Industrial Organizations and that it would not be successful because of the radical constituency of that organization (R. 169; 545–547). At about the same time, a group of petitioner's bookkeepers who had joined a union were urged by the head bookkeeper with whom they discussed the matter, to take up with Schacht, the chief clerk, the advisability of their remaining members (R. 169; 557–558, 590, 591–592, 1180, 1189, 1192, 1205, 1218, 1240, 1270–1271). Schacht, who was charged with the responsibility for recommending promotions (R. 170; 544, 1055–1056, 1255–1256, 1258), discouraged their adherence to a union on the ground that it would be incompatible with professional preferment (R. 169–170; 592–593). Shortly after Schacht's talk every one of the bookkeepers who had heard him [5] requested the head bookkeeper to prepare letters

[5] Thomson, R. 592; Arata, R. 1182; Breen, R. 1193–1194; Brugaletta, R. 1235–1236; Healy, R. 1186–1187; Malaspina, R. 1225–1226; O'Donnell, R. 1277–1278; Pozza, R. 1241–1242; R. 1182, 1236.

516399—43——2

of resignation for him (R. 170; 1186, 1188, 1190, 1243, 1244). Letters of resignation were accordingly prepared by the head bookkeeper, signed by 9 of the bookkeepers, out of the group of 15 which had originally joined the union, and mailed together to the Union (R. 170; 560–564, 594–595, 602–603, 1188, 1203–1204, 1238, 1240, 1243–1244). The Board found that by the statements of petitioner's supervisory personnel related above, viewed in the light of petitioner's other conduct to be summarized hereinafter, petitioner interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act (R. 170–171).

In August 1937, union organizers appeared at petitioner's garage and sought to enlist union memberships among the automotive messengers (R. 174; 769, 777).[6] Campana, the branch man-

[6] These included ten employees: Paul Kovacich, Arthur Slattery, William Slattery, Thomas R. Cochrane, Attilio Barbano, Edward McCarthy, John Marconi, William Nicholas, Mario Petrocchi, and Frank Ruggiero (R. 173; 1862–1878). These together with C. C. Kerins, the manager (R. 173; 758, 1483), Charles Gloeckner, his assistant (R. 173; 783, 825–826, 1599), and John Carrick, a temporary employee (R. 173; 841), constituted the entire personnel of petitioner's automotive messenger department in the San Francisco area (R. 173–174; 831). This department, transferred to petitioner's direct control in 1931, after a period during which the service was contracted for through Kerins (R. 174; 1602), was responsible for the transportation of checks, supplies, and mail between the branches and the mail office. In addition to nine city routes with one messenger regularly assigned to each, there were two out-of-town routes (R. 174; 831–832, 955, 1606).

ager, promptly appeared with Kerins, the manager of the department, and ordered the organizers off and observed that they were "troublemakers" (R. 175; 769, 1531–1532). When the organizers reappeared on about August 20, most of the messengers became union members (R. 175; 777–779, 787–788, 846–847, 866–868, 910, 928–929, 971, 979–981). On being questioned by Kerins, one of the messengers told him that they had all signed up (R. 175; 780).

On the morning of September 3, Campana informed the messengers that petitioner had abolished their department and then held separate interviews with three of them, Kovacich, Carrick, and Ruggiero (R. 175; 784, 787, 833–838, 847–848, 910–911, 930, 972–973, 1535). Each was asked whether he had signed anything or joined any organizations. Kovacich, who had applied for membership, told Campana that he had not done so (R. 175–176; 846, 848). Campana then told him not to lie because he had the names of all the union members and forthwith discharged him (*id.*). Carrick, who was the last of the messengers to be employed, had not applied for union membership, and so informed Campana (R. 175; 833–835, 837–839). Campana promised Carrick petitioner would use him on another job (*id*). Ruggiero at first denied having joined the union, but thereafter admitted it when Campana told him that he had better tell him the truth because he knew

the identity of all the union members (R. 176; 972–973).

That same day, petitioner substituted for its former automotive messenger system a new system whereby individual service contracts were entered into with bonded drivers (R. 176; 1028–1032, 1848–1858). Although the automotive messenger system had been in operation for 6 years, none of petitioner's officials charged with responsibility for operation of the department knew that a change was contemplated until it was made effective (R. 178–179; 1442, 1513–1514, 1569–1570, 1575–1576, 1833, 1929–1930). Petitioner offered no explanation for suddenness of its change. Petioner assigned one of the messengers, Gloeckner, who had not joined the union, to the job of driver under its new system, and awarded the remaining five jobs to persons employed in other departments (R. 176–177; 1028–1032, 1439, 1442, 1845–1858).

On September 7, petitioner discharged Ruggiero, Arthur Slattery, Cochrane, Barbano, McCarthy, Marconi, Nicholas and Petrocchi (R. 176; 788, 869, 923–924, 940, 1860–1878). Carrick was given a temporary job (R. 175; 833–835, 837–839). William Slattery, who was absent from work due to an accident, was discharged when he returned to work, upon the asserted ground that petitioner could not discriminate between employees of the abolished department, although both Carrick and Gloeckner, who had not joined the union, were re-

tained (R. 176; 955–958; *supra,* pp. 9–10). None of the discharged messengers was given an opportunity to qualify for another job, although five of them had continuous service records ranging from 8 to 2 years (R. 177–178; 758–761, 774–775, 1868, 1870, 1872, 1876, 1878).

The Board found that petitioner timed the change in the automotive messenger service and discharged the 10 automotive messengers in order to rid itself of a nucleus of union members and sympathizers, and thereby violated Section 8 (1) and (3) of the Act (R. 180–181, 186).[7]

3. Denial of Subpoenas for Material in the Board Files

During the hearing petitioner applied for and was denied a subpoena for the production of (1) written statements made by witnesses to members of the Board's staff which were not used in the hearing (R. 819–820, 842, 861–863, 880); (2) correspondence between petitioner and the Board's regional office relating primarily to negotiation and settlement efforts prior to the hearing; and (3) all other statements in the files of the regional office or the Board "in any way connected with" the case (R. 1307–1311, 1321). With respect to the last two groups of statements, petitioner's asserted "sole purpose in asking for these docu-

[7] The Board dismissed the complaint insofar as it alleged discrimination as to the tenure of two additional employees (R. 188).

ments" was to obtain evidence that "there has been a deliberate attempt to favor the C. I. O. over the A. F. of L."[8] (R. 1313).

The Board's order directed petitioner to cease and desist from its unfair labor practices, to reinstate the discharged employees with back pay, and to post appropriate notices (R. 185–188).

On April 1, 1941, the Board filed in the court below a petition for enforcement (R. 178–184) and on April 12, 1941, the court below ordered that No. 758 (9784 below) be consolidated for all purposes with the instant case. On September 14, 1942, the court below handed down its opinion and decree (R. 2069–2085) enforcing the Board's order.

ARGUMENT

1. Commerce

Petitioner's contention (Pet. 9, 20–25) that the Act may not be applied to its operations is without merit. The court below, upon a consideration of the facts, properly found petitioner's operations to fall within principles definitive of the jurisdictional scope of the Act as decided by this Court (R. 2072–2074). No other result is

[8] This charge was clarified by an offer of proof (R. 1320–1321) that in prior settlement negotiations the Board's Regional Attorney had rejected a proposed agreement providing for the posting of notices in petitioner's branches stating that petitioner would not discourage union membership but omitting the name of the charging union (a C. I. O. union).

possible and no conflict of decisions is raised by the court's holding.

The test of jurisdiction laid down in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, is satisfied in any case in which "stoppage of * * * operations by industrial strife" would result in substantial interruption to or interference with the free flow of interstate commerce (301 U. S., at 41). Where such interruption would occur, the Court pointed out, unfair labor practices on the part of employers, shown by long experience to be "prolific causes of strife," have a "close and intimate relation" to interstate commerce and are subject to federal regulation under this Act (301 U. S., at 42, 43).

The widespread and drastic effects upon interstate and foreign commerce which would ensue from a cessation or restriction of petitioner's operations are patent upon the record. Huge interstate and foreign shipments of finished goods covered by bills drawn for petitioner's acceptance would pile up on docks, in freight terminals, and in warehouses for want of funds petitioner provides, funds which make possible their ceaseless movement from producer, domestic or foreign, to consumer, domestic or foreign. Similar results would attend a cessation of each of petitioner's other credit activities. The inability of merchants and retail customers to obtain petitioner's credit would play colossal havoc with the shipment and

distribution of merchandise. Like effects would attend the inability of California enterprises to obtain the funds necessary to the normal production and shipment of their products, such as the vital packing and canning industries whose products are distributed throughout the markets of the nation and the world, the lumber industry, the expanding airplane industry, the shipping industry, petroleum extraction and refining, and the like. A comparable blight would follow from a cessation of the operations and mechanisms by which petitioner collects, and handles for collection, checks, notes, bills, and comparable instruments, instruments whose prompt payment is a prime prerequisite to the conduct of commerce. Over thirty years ago, in *Noble State Bank* v. *Haskell,* 219 U. S. 104, 111, Mr. Justice Holmes observed that one of the "primary conditions of successful commerce * * * at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business."

The facts plainly show that petitioner's activities affect commerce sufficiently to bring them within the Act. Compare *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197; *Board of Trade* v. *Olsen,* 262 U. S. 1; *Stafford* v. *Wallace,* 258 U. S. 495; *United States* v. *Rock Royal Co-operative, Inc.,* 307 U. S. 533; *Wickard* v. *Filburn,* No. 59, decided Nov. 9, 1942;

United States v. *General Motors Corp.*, 121 F. (2d) 376 (C. C. A. 7), certiorari denied, 314 U. S. 618.

Aside from the intimate and pervasive effect of petitioner's operations upon interstate and foreign commerce, petitioner is subject to Congressional regulation because it is directly engaged in interstate commerce. Not as an optional or casual matter, but as an indispensable and regular feature of its business, petitioner constantly and extensively uses the mails, the telegraph, and like instrumentalities of interstate and foreign commerce to transmit and receive checks, bills, drafts, notes, and money, which are the media of its business. To take a single example, in 1937 petitioner made telegraphic transfers of funds outside the state in the sum of more than 463 million dollars, while receiving such transfers from without the state in the sum of over 606 million dollars. (R. 165; 1287.)

It cannot be doubted that one who, as a regular, characteristic, and necessary aspect of his operations, makes such use of the instrumentalities of commerce is directly engaged in interstate commerce and as such subject to regulation by Congress. With respect to similar operations, the Court has declared the Act applicable. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128–129. Cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 229–230; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S.

419, 432–433; *United States* v. *Ferger*, 250 U. S. 199;[9] *Champion* v. *Ames*, 188 U. S. 321.[10]

2. The Exemption of "The United States"

Petitioner contends that because it is a national banking association it is not an employer within the meaning of the Act (Pet. 20–22). Section 2 (2) of the Act excludes from the definition of employer "the United States, or any State or political subdivision thereof."[11] Petitioner seeks

[9] In the *Ferger* case the Court held that bills of lading covering interstate shipments were instrumentalities of interstate commerce so that Congress had full power to regulate their use. The acceptances, bills, drafts, warehouse receipts, checks, and like instruments covering interstate and foreign shipments, which petitioner buys, sells, accepts, makes, and otherwise deals in, would likewise seem to be instrumentalities of interstate and foreign commerce.

[10] Other relevant decisions are *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 276; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 107; *Federal Radio Comm.* v. *Nelson Bros. Co.*, 289 U. S. 266, 279; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9–10.

[11] An earler draft of the bill, introduced in 1934, which failed to be enacted, defined the term "employer" to exclude "the United States, or any State, municipal corporation, or other governmental instrumentality" (Sec. 3 (2), p. 3 of S. 2926, 73rd Cong., 2d sess. See S. Rep. No. 1184 of that session). The present Act does not contain the express exclusion of government instrumentalities. However, the issue of whether the language used is broad enough to exclude instrumentalities is not here presented. The court below expressly refrained from deciding that issue because it held that petitioner is neither the United States nor an instrumentality thereof (R. 835–836).

to bring itself within the exclusion by showing that it is organized under a federal statute and is under federal regulation (Pet. 21–23). But obviously this is not sufficient to convert a privately owned corporation into "the United States," within the meaning of the above exemption. The fact that petitioner, like thousands of other private banks, may have been created under federal laws designed to effectuate Congressional policy, does not confer governmental status upon it.[12] The contrary is not indicated by cases, stemming from *McCulloch* v. *Maryland,* 4 Wheat. 316, treating nationally chartered banks as Government instrumentalities for purposes of immunity from state control. As the court below declared (R. 836):

> It [petitioner] is a privately owned corporation, privately managed and operated in the interest of its stockholders. * * * The United States did not create it, but has merely enabled it to be created. True, national banks are subject to strict regulation and supervision, but so are a host of other private enterprises. It is true, also, that national banks may at times be called

[12] As this Court pointed out in *United States Shipping Board Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415, 425–426:

"* * * national banks * * *, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest. * * *"

upon as aids in carrying out the fiscal policies of the government, but their activities in these respects are occasional and incidental to the private purpose of the individuals who organize them.

3. The Evidence

Petitioner's contention (Pet. 10, 20, 34–36) that the Board's findings that petitioner violated Section 8 (1) and (3) of the Act are not supported by substantial evidence presents no question of general importance. Further, the evidence summarized in the Statement (*supra*, pp. 6–11) affords full support for the challenged findings. Contrary to petitioner's contention (Pet. 10, 35–36), the First Amendment does not require the Board to disregard all verbal evidence of unfair labor practices. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, does not so hold.[13] See *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 756–757 (C. C. A. 7).

[13] In this case, unlike the Board's finding with respect to the ambiguous bulletin involved in the *Virginia Electric & Power* case, the Board's conclusion was "based on the totality of the Company's activities during the period in question" (314 U. S. at 477), for not only were the statements made, as the court below noted (R. 2078), in an atmosphere "of unfriendliness to unions manifested in more authoritative quarters," but, as the Board found (R. 170–171) they acquired a coercive character, not in isolation but in connection with petitioner's subsequent illegal conduct.

4. Procedure

There is no merit to the contention that petitioner was denied a fair trial because it was refused a subpoena for the production from the Board's file of prior written statements of Board witnesses not used in the hearing [14] and of correspondence relating to prior settlement negotiations (*supra*, pp. 11–12). As the court below held (R. 2081):

> Respondent complains of the action of the Trial Examiner in refusing to require the production of certain written statements said to be in possession of the Board. It claims that in these respects there was a denial of due process. We are unable to agree. Respondent was given full opportunity to make its defense. The evidence in question does not appear to have been germane to the matter under inquiry, which was whether respondent was or was not guilty of the unfair labor practices charged against it.

The Board was plainly not required to produce evidence of this character. Absent a showing of

[14] The Trial Examiner's refusal to grant petitioner access to the Board's files to obtain such material was clearly not an abuse of discretion since a contrary ruling would jeopardize the policy, expressed in the statute, of preserving free access to the procedure provided for therein. Section 8 (4) of the Act; cf. *Goldman* v. *United States*, 316 U. S. 129, 132.

prejudice, the decision below was correct and no question worthy of review presented.[15]

Petitioner asserts here for the first time that it was denied due process because the Board applied to it Section 21 of Article II of its Rules and Regulations, which required petitioner's counsel but not Board's counsel to submit to the Trial Examiner application for subpoenas desired during the course of the hearing specifying the name of the witness and the nature of the facts to be proved (Pet. 30–31). Precisely the same objection to the Board's rules with respect to the issuance of subpoenas was made in this Court in *North Whittier Heights Citrus Association* v. *National Labor Relations Board,* 109 F. (2d) 76, 83 (C. C. A. 9), certiorari denied 310 U. S. 632. The Board's practice in this regard was expressly approved by the Court of Appeals for the District of Columbia in *Bethlehem Steel Co.* v. *National Labor Relations Board,* 120 F. (2d) 641, 651, where the court stated, "Though the Board did not apply to its own attorneys its rule that applications for subponas must specify the na-

[15] Cf. *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 175; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 177 (C. C. A. 3), certiorari denied, 308 U. S. 605; *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d) 76, 83 (C. C. A. 9), certiorari denied, 310 U. S. 632; *National Labor Relations Board* v. *Air Associates*, 121 F. (2d) 586 (C. C. A. 2); *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905, 909 (C. C. A. 6), certiorari denied, 312 U. S. 689.

ture of the fact to be proved, no unfairness to petitioners is shown to have resulted. The Board's supervisory power over its own agents enables it, irrespective of such a rule, to prevent obstructive tactics on their part." See also *National Labor Relations Board* v. *Condenser Corp.*, 128 F. (2d) 67, 80 (C. C. A. 3); *National Labor Relations Board* v. *Blackstone Mfg. Co.*, 123 F. (2d) 633, 634 (C. C. A. 2); *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756 (C. C. A. 2); *National Labor Relations Board* v. *Ed. Friedrich, Inc.*, 116 F. (2d) 888, 889 (C. C. A. 5).

Petitioner claims that on this point the instant case conflicts with *Inland Steel Corp.* v. *National Labor Relations Board*, 109 F. (2d) 9 (C. C. A. 7). But a subsequent decision of the Seventh Circuit, *National Labor Relations Board* v. *Acme-Evans Co.*, 130 F. (2d) 477, 483, certiorari denied, March 1, 1943, No. 681, this Term, proves that the Seventh Circuit does not deem the mere application of the rule, absent a showing of prejudice, a denial of due process.

Petitioner's contention that the court below erred in refusing to receive evidence that the claimed denial of due process in No. 758 by reason of alleged misconduct of the Trial Examiner also constituted a denial of due process in the instant case is obviously untenable. As is shown in the Board's brief in opposition in No. 758, pp. 10–16, petitioner's claim there was utterly with-

out merit. In addition, this case was heard some 18 months later and before another Trial Examiner (R. 357 and compare R. 268 in No. 758).

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct, and there is no conflict of decisions. Accordingly, no further review would seem to be required. If, however, the Court should regard the question of commerce as warranting the granting of the writ, the writ should be limited to that issue.

Respectfully submitted.

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APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act——

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 7.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8.

It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment membership therein, if such labor

organization is the representative of the employees as provided in section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

SEC. 10.

* * * * *

(e) * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. * * *

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In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1942

No. 759

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

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Subject Index

I.

Page

Preliminary statement 1

II.

Misstatements 2
(a) As to issue of lack of due process..... 2
(b) Other misstatements 4

III.

The infirmities in case 758 are inherent in instant case..... 6

IV.

The jurisdictional question 7

Table of Authorities Cited

Page

I. C. C. v. L. & N. R. Co. (1913), 227 U. S. 88..... 4

N. L. R. B. v. Virginia Electric & Power Co. (1941), 314 U. S. 469, 477..... 5

Wigmore on Evidence, Second Edition, Section 1017, et seq. 4

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REPLY BRIEF OF PETITIONER BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

I.

PRELIMINARY STATEMENT.

The brief for the National Labor Relations Board in opposition is to a very large extent an argument of the factual issues rather than a presentation of

legal reasons why a writ of certiorari should not be granted. Such a brief does not conform to our view of Rule 38. Accordingly, we make no reply to such factual discussion, but do reply for the purpose of correcting certain misstatements and clarifying certain ambiguous language.

II.

MISSTATEMENTS.

(a) As to issue of lack of due process.

During the hearing it appeared that there were certain documents in the possession of the Board or its attorneys, including statements made by the complaining witnesses approximately two years before the hearing and immediately subsequent to the acts concerning which complaint was made. The Petitioner requested a subpoena *duces tecum* in which it sought to have the statements in question either produced or submitted to it for its inspection. The purpose of the Petitioner in requesting the statements was to enable it to properly cross-examine the witnesses and to show that the said witnesses at a previous time when the transactions were fresh in the witnesses' minds had made statements under oath in conflict with the statements made before the trial examiner.

The subpoena was denied and the Petitioner raised the issue of due process. (R. 1321, 315, 316.) On this matter the Board's brief erroneously states:

> "Whether the Board's refusal of subpoenas for the production of immaterial evidence or privi-

leged documents constitutes a denial of due process." (Brief in Opp., page 3.)

The question presented by the subpoena is whether or not a defendant in an administrative proceeding is entitled to cross-examine the witnesses against him for the purpose of developing the truth. The evidence was not immaterial. It was most essential to Petitioner in the exercise of its right of cross-examination; its denial constituted lack of due process. Nor does the claim of the Board that these statements were privileged have any weight. There is no statute that has been called to our attention or any case cited by the Board holding that these statements are privileged. In any event whatever privilege might have attached to these documents must be disregarded in the ascertainment of truth.

Again the Board, in its brief, states:

> "There is no merit to the contention that petitioner was denied a fair trial because it was refused a subpoena for the production from the Board's file of prior written statements of Board witnesses not used in the hearing and of correspondence relating to prior settlement negotiations." (Brief in Opp. p. 19.)

The record will demonstrate that the witnesses who made the statements were called on behalf of the Board. It is also clear from the record that the written statements were in the possession of the attorneys for the Board at the hearing. (R. 842, 862.) It is inconceivable that under these circumstances that said state-

ments were not used for the purpose of framing questions and refreshing the recollection of the witnesses. Therefore the Board had unrestricted use of the statements, while the Petitioner was denied the constitutional right of using the statements in cross-examination. That these statements were admissible on cross-examination for the purpose of impeachment is a well settled rule of law. (*Wigmore on Evidence,* Second Edition, Section 1017, et seq.) It is likewise well settled that in an administrative proceeding a respondent is entitled to the right of cross-examination. (*I. C. C. v. L. & N. R. Co.* (1913), 227 U. S. 88.) This denial of the right of cross-examination is even more flagrant because the denial was made by a Board which was at the same time Petitioner's judge and adversary.

(b) Other misstatements.

As typical of other misstatements, attention is called to the following in relation to the alleged anti-union attitude of the Bank:

> "During the course of the organizational campaign one of petitioner's officials asserted that the charging union should not have joined the Congress of Industrial Organizations and that it would not be successful because of the radical constituency of that organization." (Brief in Opp. p. 7.)

The implication in the above language that the statement was made during the course of an organizational campaign is not true; it took place between an officer and an employe of Petitioner who were working in the

same department, and who were discussing various subjects and giving their personal views with regard thereto. The conversations had nothing to do with the duties of the participants within the scope of their employment. The officer had no connection with or control over personnel matters. During such conversations economic questions, opera and other matters of general interest were discussed by these employes. (R. 1262.)

But even if this conversation were authorized by the Petitioner, and were, as erroneously alleged by the Board, carried on "during the course of the organizational campaign", the opinion expressed by the officer was one that was held by many persons, and was reflected in current newspapers and magazines; and in any event it was an opinion, whether correct or incorrect, which, under the Constitution, the Petitioner or its employes had a right to hold, and moreover, to express freely. This Court has so held in *N. L. R. B. v. Virginia Electric & Power Co.* (1941), 314 U. S. 469, 477.

In addition, the favoring of one major labor organization over another would not seem to imply any union hostility. The use of this conversation to show anti-union bias is as preposterous as the use for the same purpose of the opinion of Bank's counsel that the Act was not applicable to Petitioner. (Brief in Opp., page 7.)

III.

THE INFIRMITIES IN CASE 758 ARE INHERENT IN INSTANT CASE.

The Board in its brief in opposition (page 21) has argued that the lack of due process in the companion case, No. 758, should not be imputed to this case.

We submit that even a cursory consideration of the two cases will demonstrate the error of the Board's position. The parties in the two cases were the same. The Board that denied due process in the first case was the same Board which decided the second case. The anxiety of the Board to get jurisdiction of National Banks was the same. Both cases were consolidated in the Court below and were submitted to the Circuit Court of Appeals on a consolidated brief. Under these circumstances it taxes human credulity to believe that the Board which went to the extremes which we have shown in Case No. 758 to deny to the Petitioner a fair trial, could have tried the second case fairly and impartially. But as we have heretofore pointed out, the Board in the second case was still determined to deny to the Petitioner its constitutional rights as shown by its acts in denying the subpoena for the purpose of producing documents which would have permitted an effective cross-examination.

IV.

THE JURISDICTIONAL QUESTION.

It is sufficient to point out on the jurisdictional question that the Board's brief cites no case holding that the activities of banking constitute interstate commerce, or "affect commerce" as that expression is used in the National Labor Relations Act. In our brief on the other hand, we have cited many cases holding that the functions and activities engaged in by national banks do not constitute commerce; therefore, there is no challenge to our contention that an important question of Federal law is involved which has not been, but should be settled by this Court, and, further, that there is apparent conflict in decisions with regard to the question.

WHEREFORE, Petitioner prays that the writ of certiorari be granted for all of the reasons and upon all of the grounds set forth in its petition.

Dated, San Francisco, California,
March 29, 1943.

Respectfully submitted,
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(19)

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Respondent.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

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Subject Index

	Page
Argument	4
1. The commerce question	4
2. The instrumentality question	28
3. The due process question	46

Table of Authorities Cited

Cases	Pages
Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123..	26
Bothwell v. Buckbee, Mears Co. (1927), 275 U. S. 274, 72 L. ed. 277	18
Bullard v. Nat. Eagle Bank, 85 U. S. 589, 21 L. ed. 923....	42
California Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198..	42
Clark v. Boston-Continental Nat. Bank, 9 F. S. 81.....	43
Cook County Nat. Bank v. U. S., 107 U. S. 445, 27 L. ed. 537	42, 43
Donnelly Garment Co. v. N. L. R. B., 123 Fed. (2d) 215 (November 6, 1941)	48
Dresser v. Traders' Nat. Bank, 165 Mass. 120, 42 N. E. 567	43
Ducat v. Chicago, 10 Wall. 410, 19 L. ed. 972.....	18
Easton v. Iowa, 47 L. ed. 452, 188 U. S. 220.....	42
Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128 (1910).....	20
Exchange Bank of Ft. Worth v. Hensley and Roland, 240 S. W. 679 (Tex.)	43
Farmers' and Mechanics' Nat'l Bank v. Dearing, 91 U. S. 29	4, 26
Fire Ass'n v. New York, 119 U. S. 110, 30 L. ed. 342.....	18
First Nat. Bank v. Converse, 200 U. S. 425, 50 L. ed. 537..	42
First Nat. Bank of Concord v. Hawkins, 174 U. S. 364, 43 L. ed. 1007	42
First National Bank v. Nat. Exch. Bank, 92 U. S. 122, 23 L. ed. 679	42
First National Bank of San Jose v. California, 262 U. S. 366	4
Graniteville Mfg. Co. v. Query, 44 Fed. (2d) 64 (affirmed 283 U. S. 376, 75 L. ed. 1126)	19
Healey v. Stewardson Nat. Bank, 285 Ill. App. 290, 1 N. E. (2d) 858	43
Hellier v. Achorn, 255 Mass. 273, 151 N. E. 305.....	43
Hemphill v. Orloff (1928), 277 U. S. 537, 72 L. ed. 978.....	15, 26
Hooper v. California, 155 U. S. 648, 39 L. ed. 297.....	18
Hopkins v. U. S., 171 U. S. 578, 43 L. ed. 290.....	14
Inland Steel Co. v. National Labor Relations Board (1940), 109 Fed. (2d) 9	50

Pages

Liverpool Ins. Co. v. Oliver, 10 Wall. 566, 19 L. ed. 1029.. 18
Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107 42

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.....4, 16, 26
Mech. Bank v. Bank of Columbia, 5 Wheat. 326, 5 L. ed. 100 43
Metropolitan Casualty Co. v. Brownell (1934), 68 Fed. (2d) 481 18
Morgan v. U. S., 304 U. S. 1, 18..... 48

N. L. R. B. v. Idaho-Maryland Mine Corporation, 98 Fed. (2d) 129 (1938) 22
N. Y. Life Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116 18
Nat. Bank v. Atkinson, 55 Fed. 465..... 43
Nat. Union Fire Ins. Co. v. Wanberg, 260 U. S. 71, 67 L. ed. 136 18
Nathan v. Louisiana, 8 Howard 73, 12 L. ed. 992.....14, 26
Nelms v. Mortgage Co., 92 Ala. 157, 9 So. 141..... 19
New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 58 L. ed. 332 .....17, 26
Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472..... 18
Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112 26
Norton v. Bank, 61 N. H. 589..... 43
Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 324..... 18

O'Connor v. Bankers Trust Co., 159 Misc. 920 (N. Y.), 289 N. Y. S. 252 42
Osborne v. Bank of the United States, 9 Wheat. 738..... 4

Padgett v. Gulfport Fertilizer Co. (1914), 11 Ala. App. 366, 66 So. 866 23
Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357.....16, 17, 26
People ex rel. etc. v. Cairo-Alexander County Bank, 363 Ill. 589, 2 N. E. (2d) 889 42

Robertson v. Buffalo County Nat. Bank, 40 Neb. 235, 58 N. W. 715 43

Salem Bank v. Gloucester Bank, 17 Mass. 1..... 43
Schechter v. United States, 295 U. S. 495, 79 L. ed. 1570 25
Shallenberger v. First State Bank, 219 U. S. 104, 55 L. ed. 117 26
Sherman & Ellis v. Indiana etc. Co., 41 F. (2d) 588..... 43
Southern Bldg. and Loan Assoc. v. Norman, 98 Ky. 294, 32 S. W. 952 19

Pages

Southern Steamship Company v. National Labor Relations Board (1942), 316 U. S. 31 41
Standard Home Co. v. Davis, 217 Fed. 904 18

U. S. v. Carver (1923), 260 U. S. 482 2
U. S. v. City Bank of Columbus, 21 How. 356, 16 L. ed. 130 43
U. S. Fidelity and Guaranty Co. v. Kentucky, 231 U. S. 394, 58 L. ed. 283 26

Ware v. Mobile County, 209 U. S. 405, 52 L. ed. 855 26
West v. Camden, 135 U. S. 507, 34 L. ed. 254 43
Wylie v. Northampton Nat. Bank, 15 Fed. 428 43

Codes and Statutes

Constitution of the United States:
Article I, Section 8 (3) 21
Article I, Section 8 (18) 27
Criminal Code, Sections 292, 293 41

National Bank Act (Section 24, Title 12, Chapter 2, U. S. C. A.) 42
Section 2 (7) 24
Section 8 (5) 44
Section 9 (a) 44
National Labor Relations Act, Section 2 (2) 34

12 U. S. C. A., Section 24 5
12 U. S. C. A., Section 601, Fed. Res. Act, Section 25, pars. 1-5 7
U. S. R. S., Section 5136 5
U. S. R. S., Sections 5190 and 5155 6
U. S. R. S., Section 5219 16

Miscellaneous

Brannan's Negotiable Instruments Law (Sixth Edition), Section 132 11

53 Harvard Law Review (1940), 842 51
House of Representatives Report No. 1147, 74th Congress, First Session (1935), page 10 24

27 Opinion Attorney General 324 (1909) 43

Rules of Board, Article II, Section 21 50

Wigmore on Evidence, Second Edition, Section 17, et seq. 47

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 759

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner Bank of America National Trust and Savings Association respectfully petitions this Court to reconsider its decision on the petition for writ of certiorari filed in this Court on February 23, 1943, and denied on April 19, 1943 and submits the following

grounds for rehearing and granting of the writ, to-wit:[1]

I.

Whether or not banking is commerce is a federal question which ought to be decided by this Court. Denial of the petition for certiorari is not an approval by this Court of the decision of the Circuit Court of Appeals (*U. S. v. Carver* (1923), 260 U. S. 482), but leaves the law in a state of confusion and doubt. We know of no case in which this Court has held that banking is commerce. It is in the public interest and important to petitioner and to all other banks that this Court settle the law.

II.

The power of the States to create and regulate banks under their reserved police powers is threatened by the decision of the Circuit Court of Appeals that banking is commerce and may be regulated by the Congress under its commerce powers. If the Congress may regulate banks under the commerce powers, it may create them under the same powers and exclude the States entirely. The decision raises a federal question, and is not only in conflict with prior decisions of this Court on particular activities of banking, but changes the understanding of the rights and powers of the several States under the Constitution which

[1]Petitioner does not, by omission, concede that other grounds for the writ stated in the petition are not substantial but will limit this petition for reconsideration to matters which it deems most vital, not only to itself and other banks, but in the public interest.

has been accepted for more than a century. If the decision of the Circuit Court of Appeals is good constitutional law, it should be considered and approved by this Court; otherwise it should be reversed.

III.

This Court has held in numerous cases that the power of the Congress to create national banks is related to and implied in the power of the Congress to regulate the fiscal and monetary policies of the Federal Government, and that when they are created under that power such banks are instrumentalities of the United States. It is a federal question whether, as such instrumentalities, they are subject to the National Labor Relations Act.

IV.

The Trial Examiner denied petitioner a subpoena to obtain evidence which it sought for its defense. The Circuit Court of Appeals affirmed the ruling of the Trial Examiner. Whether the ruling of the Trial Examiner was in due process of law is a federal question which this Court should review. The decision of the Circuit Court of Appeals is in conflict with decisions in other Circuits, and should be reviewed on that ground.

ARGUMENT.

1. THE COMMERCE QUESTION.

The first two grounds of this petition relate to the commerce question and we shall treat them together.

The original title of the Act of Congress approved on June 3, 1864, under which petitioner exists and functions was "An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." By an Act approved on June 20, 1874, its title was changed to "The National Bank Act."

Congress did not create the national banks in the exercise of its power to regulate commerce. It conceived that the business of banking by corporate institutions, licensed by its authority and subject to strict regulation and control by the Government, would serve an important public purpose.

M'Culloch v. Maryland, 4 Wheat. 316;

Osborne v. Bank of the United States, 9 Wheat. 738;

Farmers' and Mechanics' Nat'l Bank v. Dearing, 91 U. S. 29;

First National Bank of San Jose v. California, 262 U. S. 366.

In granting and limiting the corporate powers of such banks, it expressly defined its conception of the business of banking in the following terms:

> "Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts,

bills of exchange, and other evidences of debts; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title. * * *"

U.S.R.S. 5136; 12 U.S.C.A., Sec. 24.

The National Labor Relations Act has not changed the congressional definition of banking nor redefined commerce as an activity which includes banking. Economists refer to money as the "lifeblood of commerce", but banking is, essentially, a balancing of debits and credits and deals with intangibles. Almost every piece of commercial paper used or circulated by a bank, in one way or another, evidences a debt or balances an account, or transfers a debit or a credit. The credit may rest upon money which must be legal tender, but the money itself is rarely moved from place to place and any such movement is only incidental to the business of banking. We know of no case which defines banking as commerce. There are many decisions in which this Court has referred to particular activities of banking as incidental to commerce but not as commerce.

A bank deposit is not earmarked money at all, but evidences that the bank owes the depositor a certain amount of legal tender. The depositor may order machinery from a manufacturer in Chicago. With his order he will forward a check on his local bank. The manufacturer will collect it by deposit in his local bank which will obtain a transfer of the credit. The manufacturer has made or will make the machinery,

in which event it is now held that the act of manufacture affects commerce. The carrier will receive and deliver it to the purchaser who ordered it. The act of transportation is commerce. *But can anyone rationally argue that the bank, in transferring the credit, was engaged in commerce? It dealt with the intangibles which evidenced the transaction and were incidental to the activities which were commerce.*

Each national bank is required by law to do business in a single state and may not have branches in other states. Branches are permitted within the boundaries of the state in which the bank is authorized to do business on a parity with competing state banks. (U.S.R.S. Sections 5190 and 5155.) The head office and principal place of business of petitioner is at San Francisco, California, and it has four hundred and ninety-five branches in other places in California. It has no branches in any other state. Its operations and activities are local and intrastate. It has a representative in the City of New York but his activities are purely promotional. He is a representative of the Business Extension Department. He receives no deposits, makes no loans, maintains no banking facilities. (R. pp. 407, 408, 488.) The law does not permit him to do so.

National banks are permitted by law, under certain restrictions and conditions, to establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States, *and to act if required to do so as fiscal agents of the United States.*

(Title 12, U.S.C.A., Section 601, Fed. Res. Act, Section 25, pars. 1-5.) In "furtherance of" means in "aid of" but does not necessarily mean commerce. As will be seen the aid is incidental to the commerce.

Petitioner has a branch in London, England. The London branch accepts deposits and makes loans. In 1937, the net profit of the London branch was $3711.08. For the same year petitioner's net earnings from the whole system amounted to $13,280,851.41. In 1938, petitioner's London branch had a net profit of $38,-164.17, which included recoveries of $27,692.81, the major portion of which was a refund of taxes paid to the British Government in a previous year. The net operating income of the London branch, exclusive of recoveries, for that year was $10,471.36. For the same year respondent's entire net earnings amounted to $15,729,608.44. (R. pp. 1280-1284.)

On December 31, 1937, the London branch had total deposit liabilities of $5,300,548.78. On December 31, 1938, the London branch had total deposit liabilities of $4,083,381.55. (R. p. 1281.) On the same dates petitioner's total deposit liabilities in all its branches were $1,300,000,000.00 and $1,400,000,000.00, respectively. (R. p. 1289.) The London branch does approximately one-third of one per cent of petitioner's total business. There is no showing or evidence in the record that the London branch or its activities have any substantial relation to or effect upon the foreign commerce of the United States.

Petitioner is a large holder of obligations of the United States. On December 31, 1938, its holdings of

government bonds and treasury obligations amounted to $345,464,15.00. (R. p. 433.) Its purchases of short-term offerings of the Treasury Department are usually made through the Federal Reserve Bank in New York City. Delivery is made by the Federal Reserve Bank and is an activity of that agency of the United States. (R. p. 481.) Petitioner's purchases and sales of general obligations of the United States are usually made through brokers in New York, several of whom have offices in San Francisco. (R. p. 433.) We challenge any argument that dealings in obligations of the United States bear any relation to, or constitute commerce in any sense. Such dealings further one of the purposes for which national banks were created—to aid the fiscal policies of the Government.

Petitioner, as the law requires, is a member of the Federal Reserve System. On December 31, 1937, it had on deposit $151,019,313.04 and on December 31, 1938, $148,267,594.07 with the Federal Reserve Bank. On the same dates it had on deposit $23,304,090.06 and $56,568,044.54, respectively, in banks located in other states. (R. p. 443.) On the same dates it had on deposit $1,482,394.97 and $1,112,358.50, respectively, in banks located in foreign countries. (R. p. 444.)

Checks on other banks deposited with petitioner in San Francisco and Los Angeles are delivered to the Federal Reserve Bank in those places for collection. (R. p. 446.) Checks on out of state banks are likewise in the main collected through the Federal Reserve Bank. (R. p. 446.) The Federal Reserve Banks operate a wire transfer system which is based upon a

settlement fund maintained with the Federal Reserve Bank in New York by the several regional Reserve Banks. When a request for a transfer of funds is made of a Federal Reserve Bank, that bank telegraphs to the Federal Reserve Bank nearest to the point of payment and asks it to effect the payment. When payment is effected, the Federal Reserve Bank at the point of payment advises the Federal Reserve Bank of New York, which, by appropriate entries upon its books, charges and credits the other Federal Reserve Banks which participated in handling the collection and they in turn charge or credit the banks for which the funds were transferred. (R. p. 454.) It is thus apparent that a large part of the business of all member banks, including petitioner, is handled through the Federal Reserve System which is an instrumentality of the United States. While this fact bears upon the instrumentality question, it also negatives the contention of the Board that banks are engaged in commerce.

Petitioner is authorized by law to do business as a corporate trustee in the State of California. It has a trust department which acts as administrator, executor and guardian under appointment of the Courts of California. (R. p. 469.) It also acts as trustee under private appointments. It has a corporate trust division and acts as trustee for bondholders and other issuers of securities secured by real estate and other property. It also acts as registrar and transfer agent for issues of corporate securities. By far the larger number of its appointments in any of said capacities are by persons and for corporations domiciled in California. (R. p. 470.)

In performing its trust functions it acts in a representative capacity. Its trust department is a service department. Private individuals may act in the same capacity and perform the same service. It requires imagination to find in the activities of its trust department anything which affects, or the obstruction of which, would burden commerce.

Of course, petitioner in the business of banking makes loans to the agricultural industry, to individuals for personal use and to small merchants in the state. Its average loan amounts to $1700.00 and its loans are distributed far and wide in all of its branches in California. (R. pp. 428-429.) It makes loans to qualified brokers, to the petroleum industry, to the motion picture industry, to the food-canning and processing industry, to the mining industry, to the clothing industry, to manufacturers of transportation equipment, to newspapers and to publishing concerns. Substantially all such loans are made in California and are purely intrastate. The promise of their repayment is evidenced by promissory notes or choses in action. (R. pp. 404, 474, 1290.) It has no branches in other states where it may make or hold loans. If it lends money to a borrower domiciled in another state, the borrower usually receives the proceeds of the loan or it is credited to his account in California, or the credit is transferred to him through another bank.

Petitioner's loan portfolio at the time of the hearing was approximately $700,000,000.00, of which slightly less than one-half constituted loans on real

estate in California. (R. p. 1293.) Lending on the security of real estate in California, or for that matter in any other state, is not commerce in any sense.

Petitioner deals in acceptances. An acceptance is a draft or bill of exchange which has been accepted by a drawee. The incidents and the effect of an acceptance are stated in Brannan's Negotiable Instruments Law (Sixth Edition), Section 132, as follows:

> "Sec. 132. Acceptance—How Made, etc.
>
> The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. *It must not express that the drawee will perform his promise by any other means than the payment of money.*" (Emphasis supplied.)

It is a form of instrument by which money or credit is transferred from one person to another. Its use in some form is as old as the Law Merchant. When accepted by the drawee, it becomes the drawee's obligation to pay money and may be bought and sold as any evidence of debt. It may be used to pay for merchandise or property which will never enter the channels of trade or commerce. It may be accompanied by and used to pay for bills of lading for goods and merchandise to be transported in interstate and foreign commerce. Its use is only incidental to the production or transportation of the merchandise.

If merchandise is shipped to a purchaser in California, the bank may receive from the shipper a bill of lading to be delivered to a buyer, who is a customer

of the bank, upon payment of an attached draft or bill of exchange or upon the acceptance thereof. If the buyer has established his credit with the drawee bank, it may receive the bill of exchange and charge the amount to be collected for it to its customer's account, and deliver the bill of lading to the customer who is the purchaser of the goods. If the draft is forwarded with the bill of lading by a bank in another state or country, upon advice of the acceptance, the forwarding bank may pay the shipper for the goods and the two banks will settle the obligation evidenced by the acceptance between themselves in due course of their business.

The draft or the acceptance evidences merely a money or credit transaction between the banks and their customers. The bill of lading, which is a symbol for the merchandise, is an instrument in which the banks are not interested or in respect of which they act as agents only. It is a thing apart from the draft by which the money or credit is to be transferred. The draft or the acceptance and the transfer of money is only incidental to the sale or transportation of the merchandise, which is or may be commerce. It is important to keep in mind that whenever a bank has any interest in a bill of lading it is usually as security for a loan or credit to a consignor or consignee.

It frequently happens that a draft or bill of exchange accompanied by a bill of lading is not presented to the drawee bank for acceptance or collection until the merchandise represented by the bill of lading has reached its destination. The merchandise has then

finished its journey in commerce and payment or acceptance of the draft may not then be even an incident of commerce.

The Board relies on evidence (R. p. 415) that petitioner on December 31, 1937, held over $1,000,000.00 worth of commercial paper payable outside the state. Such commercial paper was in the form of promissory notes. Such paper represented slightly more than one-seventh of one per cent of respondent's loan portfolio on that date. There is no evidence that such notes had any relation to commerce. They are evidences of debt and nothing else. If holding them was commerce, then anyone who holds a promissory note payable in another state is engaged in commerce and subject to the Act.

Petitioner issues or sells to its customers letters of credit and traveler's cheques. (R. pp. 467, 468.) Such paper is evidence that the holder has established a credit with the issuing banks, which will repay funds advanced against or paid for the paper. The bank which advances funds against the letter of credit will charge the account of the issuing bank or draw upon the issuing bank to repay the funds advanced. The issuing bank may not know for what purpose the credit is to be used. It is immaterial whether it does or not. The credit may be used in aid of commerce, but the act of the bank in extending it is merely incidental. The letter of credit is a contract between the issuing bank and its customer and the bank that honors the credit. The issuing and the paying banks play no part in any act which constitutes commerce although

the customer who uses the credit may be actually engaged in commerce or in the production of goods for commerce or he may use the credit to buy a farm in Iowa, or to pay for meals in a New York hotel.

In *Hopkins v. U. S.*, 171 U. S. 578, 43 L. ed. 290, this Court said:

> "Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce. They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges, or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce."

In *Nathan v. Louisiana*, 8 Howard 73, 12 L. ed. 992, this Court considered whether a state could tax the business of a money and exchange broker whose sole activity was negotiating and effecting for others, for a commission, the purchase and sale of exchange on other states and foreign countries. This Court said:

> "As an exchange broker, the defendant had a right to deal in every description of paper, and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange; and upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce. * * *
>
> "A bill of exchange is neither an export nor an import. It is not transmitted through the ordi-

nary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable.

"The dealer in bills of exchange requires capital and credit. He generally draws the instrument, or it is drawn at his instance, when he is desirous of purchasing it. The bill is worth more or less, as the rate of exchange shall be between the places where it is drawn and where it is made payable. This rate is principally regulated by the expense of transporting the specie from the one place to the other, influenced somewhat by the demand and supply of specie. Now, the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a State in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship builder, without whose labor foreign commerce could not be carried on."

In *Hemphill v. Orloff* (1928), 277 U. S. 537, 72 L. ed. 978, 984, Mr. Justice McReynolds, speaking for this Court, said:

"Upon the facts disclosed, the court below held the Trust was carrying on the business of dealing in negotiable notes within the state of Michigan; and we find no reason for rejecting that conclusion. Such business is not interstate commerce. Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357;"

It is no answer to the principle stated in this case to say that the same transactions, if conducted by a bank, are of a different character because they are not taxable by the states. The national banks may not be taxed by the states except as permitted by Congress because they are agencies or instrumentalities of the United States. (*M'Culloch v. Maryland,* 4 Wheat. 316, 4 L. ed. 579.) Congress now permits and at the same time limits the character and amount of such taxation (Sec. 5219, U. S. R. S.), but the tax is on the business or income or shares of the banks, and not on an instrumentality of commerce.

It is well settled that the insurance business—life, accident or liability—does not constitute interstate commerce, *or commerce at all.* In the case of *Paul v. Virginia,* 8 Wall. 168, 19 L. ed. 357, Paul, a resident of Virginia, was appointed agent for several New York insurance companies. He failed to comply with the Virginia law requiring a deposit of bonds with the treasurer of the state, and was indicted and convicted. He appealed, contending that the law violated the commerce clause of the Federal Constitution. Mr. Justice Field, writing the opinion of this Court, declared:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent

of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. *They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration.* Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. *They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."* (Emphasis supplied.)

In the later case of *New York Life Ins. Co. v. Deer Lodge County,* 231 U. S. 495, 58 L. ed. 332, involving the constitutionality of a statute of Montana imposing certain taxes on insurance companies, *Paul v. Virginia* was declared to be the progenitor and controlling case. Mr. Justice McKenna, after reviewing the authorities, held:

"It was also urged that modern life insurance had taken on essentially a national and international character, and that when Paul v. Virginia was decided the business was 'to a great extent local; that is, conducted through the domestic contracts by stock companies. The great and commanding organizations of the present day had hardly begun the amazing developments which have made them the greatest associations of administrative trusts of the business world'.

> "These contentions were earnestly made; the reply to them deliberately meditated and its extent fully appreciated. The ruling in Paul v. Virginia and other cases was applied. We omitted the reasoning by which they demonstrated, we said, the correctness of their conclusion. We, however, repeated that the business of insurance is not commerce. *The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse,* and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea', and, we added, that 'against the uncertainty of man's mortality'." (Emphasis supplied.)

This principle is reaffirmed in the following cases: *Ducat v. Chicago,* 10 Wall. 410, 19 L. ed. 972; *Liverpool Ins. Co. v. Oliver,* 10 Wall. 566, 19 L. ed. 1029; *Fire Ass'n v. New York,* 119 U. S. 110, 30 L. ed. 342; *Hooper v. California,* 155 U. S. 648, 39 L. ed. 297; *Noble v. Mitchell,* 164 U. S. 367, 41 L. ed. 472; *N. Y. Life Ins. Co. v. Cravens,* 178 U. S. 389, 44 L. ed. 1116; *Nutting v. Massachusetts,* 183 U. S. 553, 46 L. ed. 324; *Nat. Union Fire Ins. Co. v. Wanberg,* 260 U. S. 71, 67 L. ed. 136; *Bothwell v. Buckbee, Mears Co.* (1927), 275 U. S. 274, 72 L. ed. 277; *Metropolitan Casualty Co. v. Brownell* (1934), 68 Fed. (2d) 481.

In *Standard Home Co. v. Davis,* 217 Fed. 904, plaintiff company was engaged in the sale of investment home purchasing contracts and in lending money in various states. An Arkansas Act imposed a fee on foreign investment companies. On the question of the relation of the business of the defendant to interstate commerce, the Court held that the com-

pany offered nothing for sale; that it was purely an investment company, and that it was no more involved in commerce than were insurance companies. The Court further stated:

> "Nor are loans of money made to clients for the purpose of enabling them to acquire homes commerce, within the meaning of the commerce clause. * * *"

and cited with approval the cases of *Nelms v. Mortgage Co.*, 92 Ala. 157, 9 So. 141; *Southern Bldg. and Loan Assoc. v. Norman*, 98 Ky. 294, 32 S. W. 952.

Graniteville Mfg. Co. v. Query, 44 Fed. (2d) 64 (affirmed 283 U. S. 376, 75 L. ed. 1126), involved a state stamp tax on promissory notes. The manufacturing corporation executed promissory notes payable to banks and banking houses outside the state. The company argued that the tax on the notes payable outside the state was invalid as a burden on interstate commerce. The tax was held valid as not being a burden on interstate commerce, but simply a tax levied in relation to an act done within the state, namely, the execution of an instrument. The Court said:

> "The plaintiff contends also that the laying of the tax in question is a burden upon interstate commerce. But under the decisions of the Supreme Court *it is plain that the notes in question did not constitute interstate commerce. They are mere personal contracts. The making of such a contract is a mere incident of commercial intercourse, and sending the notes by mail or otherwise from one state to another does not constitute interstate commerce.* See New York Life Ins. Co.

v. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332, where the subject is fully discussed and the decisions reviewed." (Emphasis supplied.)

Engel v. O'Malley, decided by this Court and reported in 219 U. S. 128, 55 L. ed. 128 (1910), involved the constitutionality of a New York statute requiring that a license be obtained from the state comptroller by individuals or partnerships desiring to engage in the business of receiving deposits of money for safekeeping or for the purpose of transmission to another, or for any other purpose. The respondent refused to take out a license on the ground that the state statute was an attempt to regulate interstate commerce, and therefore was void. The state urged that there was nothing in the legislation which came within the purview of the commerce clause but that, on the contrary, it was a legitimate exercise of the police powers. It was argued that at the most banking was a mere incident of commerce which could be regulated by the state under its police powers. In holding that the commerce clause of the Constitution was not infringed, Mr. Justice Holmes said:

"* * * When, as in this matter the Constitution takes from the states only a portion of their otherwise absolute control, there may be expected difficulties in drawing the dividing line, because where it shall be put is a question of more or less. The trouble is inherent in the situation, but it is the same in kind that meets us everywhere else in the law. The question is whether the state law creates a direct burden upon what it is for Congress to control, and the facts of specific case

must be weighed. In doing so we recur to what we have said above,—*that we cannot regard the statement of the plaintiff's business in his bill as describing the receipt of bailments for the transmission of the identical objects received to other states. Neither do we regard the law as having had such bailments primarily in mind.* Under the statement in the bill and the words of the law, *we must take it that the money received even when received for transmission, becomes the money of the depositary, and his obligation that of a debtor under contract to pay as may be directed.*" (Emphasis supplied.)

In its decision affirming the findings and conclusions of the Board that the activities and business of petitioner constitute commerce within the meaning and intent of the Act, the Circuit Court of Appeals has decided, in effect, that banking and its activities constitute commerce among the several states and with foreign countries within the meaning and intent of Article I, Section 8 (3) of the Constitution of the United States. *The decision fails to distinguish activities which directly constitute commerce, or which directly burden and affect commerce, from activities which only affect commerce incidentally, or not at all.*

The effect of the decision, if it becomes final, will be to confirm in Congress the exclusive power under the commerce clause of the Constitution, whenever it so elects, to license and regulate all banking, and to exclude the several states from their sovereign right, in the exercise of their police powers, to permit and regulate banking under state laws. If the decision is sound law it will have deep and far-reaching effects

upon the future course of banking and the financial policies of the United States.

Consideration of the commerce question by the Circuit Court of Appeals is inadequate. It is an acceptance of the conclusions of the Board and confuses the incidents of banking with the objects of commerce. It is contrary to all prior pronouncements of this Court that many transactions and activities which are common to all banking affect commerce incidentally but are not in themselves commerce; that money, in terms of which banking is transacted, is not a commodity of commerce.

The subject of banking is money. It is not a commodity of commerce. It is a medium of exchange and its use is universal in all human activities. If its use in commerce by one who owns it or by those who borrow it, subjects the owner or the lender to regulation under the commerce powers in the Constitution, then we must search fruitlessly for any activities which may not be so regulated. In *N. L. R. B. v. Idaho-Maryland Mine Corporation,* 98 Fed. (2d) 129 (1938), the Circuit Court of Appeals in the Ninth Circuit noted the effect of so holding in the following terse statement:

> "The Board asserts, without proof, that respondent's production of gold is 'the production of that upon which not only domestic but world trade is based and secured;' that 'Interstate and foreign commerce being so vitally dependent upon and so delicately adjusted to gold, necessarily the supply of gold critically affects that commerce'; and that respondent's production of gold 'consti-

tutes the very life-blood of commerce, any interference with which would have drastic repercussions in interstate and foreign commerce'.

"On the basis of these unproved and, we think, unprovable assertions, the Board asks us to hold the National Labor Relations Act applicable to respondent. *This we decline to do. Jurisdiction of respondent's labor relations cannot be predicated upon the fact that it happens to be a producer of a metal which, in former times, was used as money, and which, in this country, still bears some relation to money. If that were sufficient to confer jurisdiction, every employer who pays wages, buys goods or spends money for any purpose—in other words, all employers—would be subject to the act, which manifestly is not the case.*" (Emphasis supplied.)

In *Padgett v. Gulfport Fertilizer Co.* (1914), 11 Ala. App. 366, 66 So. 866, 870, the Court said:

"Money, unlike commercial fertilizers, is not an article of commerce, but is merely a medium of exchange, *and the loaning of it by a foreign corporation to a resident of this state does not, like a sale of articles of commerce, constitute interstate commerce, or fall within the protective provisions of the commerce clause of the federal constitution.*" (Emphasis supplied.)

Money does not grow from the ground like crops. It is not processed for sale and is not transported to be worn or consumed. It is not produced like gas or electricity to drive the wheels of commerce and industry. It is not gathered like news to be sent from place to place to be printed in newspapers and books.

All of these things are tangible. Money is intangible. It is a token or symbol of values. Its value is fixed by law. Unless it is legal tender it has no value.

The Board argued that the use of money is commerce because it affects commerce. The weather affects commerce as it produces or retards crops. Political policies affect commerce; tariffs and taxes encourage or retard its flow. Governments may increase or decrease the value of money and that affects commerce. So many things affect commerce that the mind becomes confused in trying to think of them all. Commerce is realistic and its objects are tangible.

The Act with which we are dealing limits its application to things which are commerce or which affect commerce by burdening or obstructing it. Sec. 2(7) of the Act obviously asserts all of the power of Congress under the commerce clause of the Constitution.

We find light on the wording and intent of the Act in House of Representatives Report No. 1147, 74th Congress, First Session (1935). We quote from the report at page 10:

> "The definitions in subsections 6 and 7 are intended as the basic jurisdictional definitions as used in their appropriate setting in Sections 9 and 10. *The bill is based squarely on the power of Congress to regulate commerce among the several states and with foreign nations.* It does not apply to controversies or practices of purely local significance, which do not presently or potentially burden or obstruct the free flow of such commerce.
>
> "The Committee Amendment to subsection 6 narrows the definition of interstate commerce by not

making it extend to transportation or communication that is merely 'related to' interstate commerce. *This change has been made in view of the doubts that the Schechter Case casts upon the validity of regulating practices that are merely 'related to' or 'indirectly' interstate commerce.*

"The new definition inserted by the Committee Amendment to *subsection 7 also helps to confine the bill to the proper sphere under the Schechter decision by removing from its purview practices which merely 'affect' interstate commerce. Under this Amendment the bill is confined to practices 'burdening or obstructing' interstate commerce.* These words have received repeated recognition in court decisions as fit bases for Federal jurisdiction." (Emphasis supplied.)

In *Schechter v. United States,* 295 U. S. 495, 79 L. ed. 1570, this Court, in a unanimous opinion, written by Chief Justice Hughes, said:

"In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle * * * If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

If money is not a commodity of commerce, the use of checks and other so-called commercial instruments is not commerce. The mere fact that mails or other means of communication are used in connection with a business activity does not make such use interstate commerce if the articles for which the facilities are used are not commodities of commerce.

U. S. Fidelity and Guaranty Co. v. Kentucky, 231 U. S. 394, 58 L. ed. 283;

Hemphill v. Orloff, 277 U. S. 537, 72 L. ed. 978;

Ware v. Mobile County, 209 U. S. 405, 52 L. ed. 855;

Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992;

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357;

New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 58 L. ed. 332.

This Court has affirmed the power of the states to create and regulate banks.

Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112;

Shallenberger v. First State Bank, 219 U. S. 104, 55 L. ed. 117;

Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123.

The states, since the decision of this court in *M'Culloch v. Maryland,* supra, and the decision in *Farmers' and Mechanics' Nat'l Bank v. Dearing,* supra, which upheld the present national banking system, have licensed and regulated state banks in competition with the national banks. They have done so in reliance on their reserved police powers and in com-

plete confidence in the decisions of this Court which found authority for creation of the national banks in Article I, Section 8(18) of the Constitution as federal agencies necessary and appropriate to aid and support the monetary and fiscal policies of the Federal Government.

The great state banks now in existence are active competitors of the national banks. One of them in New York City is a larger bank than petitioner. The rivalry is good for business and is in the public interest.

If it is now held that banking is commerce, or that by its effect upon commerce it may be regulated in any of its activities under the commerce clause of the Constitution, then all of its activities may be so regulated, and Congress may, when it deems the time appropriate, take complete control of all banking.

The states will then be excluded from one of the most important of their remaining powers. The social and economic effects of such a change will be profound and far reaching.

The question is strictly federal in character. In the public interest as well as in the interest of banking a writ of certiorari should be granted in this case so that the question may be settled now.

2. THE INSTRUMENTALITY QUESTION.

While the petition for certiorari was pending in this case and before its denial by this Court, the Court of Appeals of Kentucky handed down a decision reaffirming the law, as it has so many times been stated by this Court, that national banks, as instrumentalities of the United States, are not subject to taxation by the States, except as Congress may permit. We refer to the case entitled *Barnes v. Anderson National Bank,* and companion cases, decided by the Kentucky Court of Appeals on March 16, 1943, and reported in ..... Southwestern Reporter at page ..... The cases involved the power of the State of Kentucky to tax national banks, state banks which were members of the Federal Reserve System, and other corporate employers under its Unemployment Compensation Act of 1938. The first Act of 1936 exempted instrumentalities of the United States from its provisions and the Act of 1938, amended in 1940, omitted the exemption.

We refer only to that part of the decision which relates to national banks. The decision contains such an excellent statement of the federal character of national banks that we believe it will be helpful to quote from it at length. On the instrumentality question the Kentucky Court said:

> "Counsel for the Commission contends that national banks are private corporations operated primarily for private profit and therefore cannot be deemed to be instrumentalities of the federal government. He argues that the opinion of Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, has been misinterpreted in a great number of Supreme Court cases following the

rendition of that opinion. The controversy in that action concerned the right of the state of Maryland to impose a tax on the Bank of the United States in the exercise of the right granted to it by Congress to issue bank notes. It was held that in issuing the notes the bank was exercising a governmental function and the operation was immune from taxation. The Court additionally reasoned that since the provisions of the act were confined to the banks not chartered under the laws of Maryland, the tax was discriminatory. The decision in that case went no further than the recitation above; but, with that as a commencement, the trend of judicial thought developed into the conclusion that national banks (apparently in all of their functions) are to be considered to be instrumentalities of the government, and, by reason of that fact, the states are without power to tax them in any respect, unless consent first shall have been obtained from the Congress of the United States.

"In Osborne v. The President etc., 9 Wheat. 738, in an opinion by Chief Justice Marshall, the Court said:

> " 'The whole opinion of the court in the case of M'Culloch v. Maryland is founded on and sustained by the idea that the bank is an instrument which is necessary and proper for carrying into effect the powers vested in the Government of the United States.'

"In both M'Culloch v. Maryland and Osborne v. The President, the bank involved was the second National Bank of the United States, which was partially owned by the United States Government. It was not until the year 1864, that Congress passed the first National Banking Act, which as

amended, is now in force. Whereas, previous to that time there had been only two national banks, after the passage of the act of 1864 many sprang into existence. The Supreme Court construed the Act of 1864 in Farmers and Mechanics National Bank v. Dearing, 91 U. S. 29, wherein it was held,

> " 'The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second Bank of the United States. The reasoning of Secretary Hamilton and of this Court in M'Culloch v. Maryland (4 Wheat. 316), and in Osborne v. The Bank of the United States (9 id. 708), therefore, applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole Judge.'

"In Davis v. Elmira Savings Bank, 161 U. S. 275, which was cited with approval in Owensboro National Bank v. Owensboro, 173 U. S. 664, the court said:

> " 'National Banks are instrumentalities of the Federal Government, created for a public purpose, and, as such, necessarily subject to the paramount authority of the United States. * * * It follows then necessarily from these conclusions, that the respective States would be wholly without power to levy any tax either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress.'

"In First National Bank v. Anderson, 269 U. S. 341, it was held:

"'National banks are not merely private moneyed institutions, but agencies of the United States created under its laws to promote the fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent.'

"Counsel for the Commission admit the existence of the opinions above cited but insist that the more recent decisions of the Supreme Court have a tendency to depart from the rule established. But we are of the opinion that he is in error in this respect. On April 22, 1940, in an opinion prepared and delivered by Mr. Justice Reed of Kentucky, the Supreme Court said:

"'* * * Congress may intervene to protect its instrumentalities (national banks) from any other tax which threatens their usefulness.'

Colorado National Bank of Denver v. Bedford, 84 L. ed. 730, 310 U. S. 41. By any other tax the court referred to any tax other than the ones Congress permits the states to levy. As recently as March 1, 1943, an opinion was rendered by the Supreme Court under the style of Maricopa County v. Valley National Bank of Phoenix (no further citation of this case can be given because it has been so recently decided as not yet to have been published in the advance sheets). The Valley National Bank sued Maricopa County, its treasurer, and its tax collector to restrain the collection of state, county, school district, and municipal taxes on its shares owned by the Reconstruction Finance Corporation for the years 1935 and 1936. The opinion pointed out that prior to March 9, 1933, national banks were not authorized to issue

preferred shares, but, on that date, they were given authority and the Reconstruction Finance Corporation was authorized to subscribe therefor. In pursuance of that authority the bank issued to Reconstruction Finance Corporation certain shares valued at $1,240,000 at par. When the shares were acquired by the Reconstruction Finance Corporation the act of Congress permitting real estate and bank shares to be taxed by states was in effect. Section 5219, Revised Statutes. Previous to March 20, 1936, the Supreme Court held that preferred shares of national banks held by the Reconstruction Finance Corporation were subject to taxation by reason of the consent given by Congress in Section 5219, supra. Baltimore National Bank v. State Tax Commission, 279 U. S. 209. On March 20, 1936, Congress enacted a statute providing that shares of preferred stock of national banks theretofore and thereafter acquired by the Reconstruction Finance Corporation shall not be the subject of taxation, as long as owned by the Corporation. 49 Stats. 1185, 12 U. S. C., section 51d. On the authority of that act, the district court issued a permanent injunction against the collection of the taxes. Judgment was affirmed by the Circuit Court of Appeals. Certiorari was granted because of the public importance of the question raised. In affirming the decision of the Circuit Court the Supreme Court said:

"'Little need be said in answer to the argument that the Act violated the Tenth Amendment. The authority by which the taxes in question were levied did not stem from the powers "reserved to the States" under the Tenth Amendment. It was conferred by Congress which has under the Constitution exclusive au-

thority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation.'

There follows citation of authorities, and the opinion resumes:

" 'Hence when Congress withdrew the privilege which it had previously granted, it was not curtailing any political power which the Constitution had reserved to Arizona.'

The opinion then cites Owensboro National Bank v. Owensboro, supra. Thus it will be seen, that within three years last past the Supreme Court has reaffirmed its determination that national banks are instrumentalities of the United States and within two weeks last past it has reaffirmed its determination that Congress has, under the Constitution, exclusive authority to determine whether and to what extent its instrumentalities shall be immune from state taxation. These decisions have been adhered to by the vast majority of courts of last resort. In respectful regard of those authorities, this court arrived at a like decision in City of Shelbyville v. Citizens Bank of Shelbyville, 272 Ky. 559, 114 S. W. (2d) 719, wherein it was said:

" 'That neither a state nor a subdivision thereof can impose a license or franchise tax on a national bank is firmly established by decisions of the Supreme Court of the United States. * * * National Banks were first established by Congress in 1864, and by an act passed in 1868, Congress granted a qualified permission to the states to tax them. This act, with slight changes, has continued in force to the present time, and is now section 5219, U. S. Rev. Stats., as amended, U. S. C. A. title 12, section 548.'

> "Thus, it will be seen, the judicial construction of the question is to the effect, not only that instrumentalities of the United States are not subject to taxation by the individual states except by the consent of Congress, but also, that national banks are such instrumentalities."

By Section 2(2) of the National Labor Relations Act, the United States is not an employer subject to the Act. The exemption of the United States in an abstract or sovereign sense means nothing. The exemption means the departments and agencies by which the United States performs its governmental functions. National banks are important instrumentalities of the United States and are not in a class with many corporations which perform for it only limited or special services.

The National Bank Act of June 3, 1864, provided for the organization of national banks with private capital. At least 30% of the capital of the banks was required to be invested in Government bonds and transferred to the Treasurer of the United States, against which he was authorized to issue to the banks circulating notes equal to 90% of the par value of the bonds, but not in excess of their market value. Though nominally issued by the banks and bearing their names, the national bank notes were Government paper money.

The Federal Reserve Act of 1913 created a system of banks to operate under the direct control of the Government through a Board of Governors appointed by the President. The national banks were required to

provide the capital for the Federal Reserve Banks, to have membership therein, and were given representation on their Boards of Directors. The Act was subsequently enlarged and amended, particularly in 1933 and 1935. It provides for the issuance of currency by the Federal Reserve Banks. By the process of retiring bonds of the United States which were eligible as security for bank notes, the Federal Reserve notes issued during and since 1933 have become the principal circulating currency, and the bank notes have been retired. *The provisions of the National Bank Act for the issuance of bank notes as circulating legal tender have not been repealed and may again appear to supplement and enlarge the present currency if the need should arise by the issuance of Government bonds eligible for their security.*

It requires no profound understanding of public finance to see the intricate and sensitive relation of the national banking structure to the fiscal policies of the Federal Government. The national banks are the foundation and the framework of the structure. If they were to disappear, the financial system of the United States would require reconstruction.

The national banks are important agencies and instrumentalities of the United States. Congress alone may determine the necessity for their existence; having spoken, its decision is not to be denied, nor its purpose defeated.

The Federal Reserve Act sought not only to provide an improved and responsive currency but went much deeper. It recognized that the essential diffi-

culty in American banking lay in its undue decentralization and consequent dissipation of strength. Fundamentally the Federal Reserve Act sought to give relief by changing the basic organization of the national banking system so as to provide for more centralization of the banking reserves and for more control of and supervision over banking. It created twelve Federal Reserve Banks, one in each of twelve Federal Reserve Districts, held together by a central body, designated the Federal Reserve Board. The Federal Reserve Banks were to be banker's banks; were not to engage in private business; and were to deal chiefly with their members and the Government. The purpose of the Federal Reserve Act is aptly stated in *United States v. Davenport,* 266 Fed. 425, as follows:

> *"The broad purpose of the Federal Reserve Act was to incorporate under federal control as members of federal reserve banks all national banks, as well as banks other than national banks. By force of the law, all national banks, though still national banks, are members of federal reserve banks.* National banks cannot exist and continue to operate alone as such within one year after the passage of the Federal Reserve Act of December, 1913, because of the mandate of the statutes." (Emphasis supplied.)

The Banking Act of 1933 created the Federal Deposit Insurance Corporation, the chief function of which is to insure the deposits of all banks which are entitled, as provided in the statute, to the benefits of insurance. The Banking Act of 1935 provided for the continuance of the Federal Deposit Insurance Corpo-

ration under the management of a board of three directors consisting of the Comptroller of the Currency and two members appointed by the President by and with the advice and consent of the Senate. Every national or state bank member of the Federal Reserve System operating August 23, 1935, must be and continue to be, an insured bank subject to the insurance-of-deposit provisions.

The national banks have become integral parts of a great system of government instrumentalities. They are public corporations. Without them the system could not function. If the Treasury Department and the Federal Reserve System and the Federal Deposit Insurance Corporation are instrumentalities of the United States, then national banks, as necessary parts of the whole integrated structure, are also its instrumentalties.

The principle that a corporation privately owned and operated for private profit may, nevertheless, be an agency and instrumentality of the United States, if the authority for its existence comes from the exercise by Congress of its constitutional power to create the agency or instrumentality, is further supported by the following recent decisions:

Ellingson v. Iowa Joint Stock Land Bank of Sioux City, Iowa, 264 N. W. 516 (1936);

Dallas Joint Stock Land Bank v. Ballard (Texas Civ. App. 1934), 74 S. W. (2d) 297, affirmed on appeal, 124 Texas 113, 76 S. W. (2d) 1042;

Smith v. Kansas City Title & T. Co. (1921), 255 U. S. 180, 41 S. Ct. 243, 65 L. ed. 577;

M. G. West Co. v. Johnson, 20 Cal. App. (2d) 95, 66 Pac. (2d) 1211; certiorari denied by the United States Supreme Court, 302 U. S. 638, 82 L. ed. 497, 58 S. Ct. 525;

Federal Land Bank v. Crosland, 261 U. S. 374, 43 S. Ct. 385, 67 L. ed. 703, 29 A. L. R. 1 (1923);

Nat. Newark etc. Bank v. Unemployment Comp'n (May, 1941), 126 N. J. 387, 19 Atl. (2d) 803;

Federal Land Bank v. Bismarck Lumber Co. (1941), 86 L. ed. 65, 314 U. S. 95.

In *Federal Land Bank v. Bismarck Lumber Co.,* supra, a lumber company sought to compel payment of a North Dakota sales tax on lumber sold to a Federal Land Bank for use in repairing buildings on land acquired by the bank through foreclosure. On certiorari this Court reversed a judgment of the local District Court of Burleigh County for payment of the tax. Mr. Justice Murphy said:

> "The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. Graves v. New York, 306 U. S. 466, 477, 83 L. ed. 927, 931, 59 S. Ct. 595, 120 A. L. R. 1466. It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. Pittman v. Home Owners' Loan

Corp., 308 U. S. 21, 32, 84 L. ed. 11, 16, 60 S. Ct. 15, 124 A. L. R. 1263; Graves v. New York, supra (306 U. S. 477, 83 L. ed. 931, 59 S. Ct. 595, 120 A. L. R. 1466).

* * * * * * *

"In support of their argument respondents rely on Smith v. Kansas City Title & T. Co., 255 U. S. 180, 65 L. ed. 577, 41 S. Ct. 243, supra, and Federal Land Bank v. Priddy, 295 U. S. 229, 79 L. ed. 1408, 55 S. Ct. 705, supra. In the Smith case we held that farm loan bonds, which might be secured by first mortgages accumulated in the course of the land banks' lending activities, could be exempted from state taxation. In the Priddy case, merely as an aid to the proper construction of Sec. 4 of the Federal Farm Loan Act giving the land banks the right to sue and be sued 'as fully as natural persons', we noted that the land banks possessed some of the characteristics of private business corporations. Their character as federal instrumentalities was specifically affirmed and the broad tax immunity granted to them was not questioned. * * *"

Whether or not other corporations created for a public purpose by Acts of Congress or with its permission are a part of the United States is not conclusive of the issues when we are concerned with national banks. It is necessary that we consider their peculiar relation to, and their particular operations under the control by the Treasury Department of the United States. The Act of June 3, 1864, which created the banks, also created the office of Comptroller of the Currency as a bureau in the Treasury Department. The Treasury Department is a branch of the Execu-

tive Department of the United States. It carries out and executes the fiscal policies and operations of the Government. If national banks operate in many respects as private corporations, they are, nevertheless, limited in the scope of their activities by the policies declared by Congress and effectively administered and put into effect by the Treasury Department. Their activities and operations are further limited and controlled by the Federal Reserve Board which is, admittedly, an arm of the Government. The Federal Reserve Board determines what reserves they must maintain and many other matters in keeping with the fiscal policies of the United States as they are changed from time to time to meet the varied conditions of a highly complex fiscal system. We do not conceive that for the purposes of a law like the National Labor Relations Act they are, or should be, any less exempt than the Treasury Department of the United States itself.

We further submit for consideration this fact: that Congress has always declared by what officers and departments of the Government the national banks are to be regulated and their operations controlled. It is also to be remembered that Congress has expressly provided that no national bank "shall be subject to any visitorial powers other than such as are authorized" by the National Bank Act "or are vested in the courts of justice". (U.S.R.S. 5241; Title 12 U.S.C.A., Section 165.)

The National Bank Act in all its particulars is, literally, an act for the regulation of national banks. Its express and exclusive provisions preclude any im-

plied intent to subject them to other regulatory laws without express provision or authority.

Fundamentally, we have here a conflict between the authority which the Board would assert, and the authority of other departments of the Government which are operating under, and whose authority comes from, laws in aid of the fiscal and monetary policies of the United States. The effect of a conflict of authority was considered by this Court in *Southern Steamship Company v. National Labor Relations Board* (1942), 316 U. S. 31. In that case the Steamship Company discharged seamen who had conducted a strike on board a vessel, docked in an American port, to compel the owner of the vessel to recognize their union which had been certified by the Board as a bargaining agent. The Board found that by discharging the seamen the shipowner had violated the Act. The employer resisted the order on the ground that the seamen were justifiably discharged because they had violated the Mutiny Statutes. (Crim. Code, Secs. 292, 293.) In ordering a remand of the case to the Board for modification of the order, this Court, by Mr. Justice Byrnes, said:

> "* * * It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

It has been repeatedly and consistently held by our Courts that national banks are corporations possessed of limited powers and that all powers not expressly or by implication granted by the provisions of the National Bank Act (Section 24, Title 12, Chapter 2, U.S.C.A.) are deemed denied. For example, this Court held in *Easton v. Iowa,* 47 L. ed. 452, 188 U. S. 220, that:

> "* * * Congress having the power to create a system of national banks is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations."

National banks have only such powers as are expressly granted or necessarily implied from specific grants, and every power not clearly granted must be regarded as withheld and prohibited. (*People ex rel. etc. v. Cairo-Alexander County Bank,* 363 Ill. 589, 2 N. E. (2d) 889; *O'Connor v. Bankers Trust Co.,* 159 Misc. 920 (N. Y.), 289 N. Y. S. 252.) The measure of their powers is the statutory grant, and all powers not conferred are denied. (*First National Bank v. Nat. Exch. Bank,* 92 U. S. 122, 23 L. ed. 679; *Logan County Nat. Bank v. Townsend,* 139 U. S. 67, 35 L. ed. 107; *California Bank v. Kennedy,* 167 U. S. 362, 42 L. ed. 198; *First Nat. Bank of Concord v. Hawkins,* 174 U. S. 364, 43 L. ed. 1007; *First Nat. Bank v. Converse,* 200 U. S. 425, 50 L. ed. 537; *Bullard v. Nat. Eagle Bank,* 85 U. S. 589, 21 L. ed. 923.)

The Act under which national banks are organized constitutes a complete system for their government. (*Cook County Nat. Bank v. U. S.,* 107 U. S. 445, 448,

27 L. ed. 537.) Anyone dealing with a bank is charged with notice of those powers and cannot plead ignorance thereof. (*Mech. Bank v. Bank of Columbia,* 5 Wheat. 326, 5 L. ed. 100; *U. S. v. City Bank of Columbus,* 21 How. 356, 16 L. ed. 130; *Salem Bank v. Gloucester Bank,* 17 Mass. 1; *Healey v. Stewardson Nat. Bank,* 285 Ill. App. 290, 1 N. E. (2d) 858.)

It is well settled that a national bank has no power to enter into contracts not incidental to its banking business. It cannot subscribe to a public or private enterprise. (*Robertson v. Buffalo County Nat. Bank,* 40 Neb. 235, 58 N. W. 715. See also *Dresser v. Traders' Nat. Bank,* 165 Mass. 120, 42 N. E. 567; *Wylie v. Northampton Nat. Bank,* 15 Fed. 428; *Norton v. Bank,* 61 N. H. 589; *Nat. Bank v. Atkinson,* 55 Fed. 465.) The contract of a national bank, to be valid, must have a natural and reasonable tendency to aid in the accomplishment of the objects for which the bank was created. (*Exchange Bank of Ft. Worth v. Hensley and Roland,* 240 S. W. 679 (Tex.).) Nor can a national bank enter into contracts which will subject it to periodical examination by private representatives. (27 Op. Atty. Gen. 324 (1909).) Any contract which gives away the control over the naming of officers and directors of a national bank is *ultra vires.* (*Clark v. Boston-Continental Nat. Bank,* 9 F. S. 81; *West v. Camden,* 135 U. S. 507, 34 L. ed. 254; *Sherman & Ellis v. Indiana etc. Co.,* 41 F. (2d) 588; *Hellier v. Achorn,* 255 Mass. 273, 151 N. E. 305.)

An examination of the powers given by the National Bank Act to a national bank, when considered in the light of the requirements of the National Labor Rela-

tions Act, leads one inevitably to the conclusion that Congress could not have intended to subject a national bank to the requirements of that Act, but on the contrary, that by exempting the United States from its jurisdiction it intended to include national banks in such exemption.

For example, in Section 8(5) of the Act, it is declared to be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

It has been held that "to bargain collectively" means to bargain in good faith, and that when a meeting of the minds has been reached between the representatives of the employees and the employer it is an unfair labor practice for the employer to then refuse to reduce such agreement to writing. It will follow that if a national bank is an employer within the meaning of the Act, it must be prepared, and it will be held an unfair labor practice if it refuses, to enter into a written agreement with the representatives of its employees embodying the understanding reached between them pursuant to collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of work. If the subsequent operation of the contract should result in such losses to, or impairment of, the bank as to destroy its usefulness, would the Comptroller of the Currency, or the Board of Directors of the Federal Reserve System, or the Board of Directors of the Federal Deposit Insurance Corporation have any power to intervene? Would they, or any of them, have the right to order the

contract terminated and to force the bank to commit an unfair labor practice? Here we have an irreconcilable conflict between two arms of government. The arm of the government having for its function the supervision and protection of the national banks will claim that the contract of the bank entered into with its employees pursuant to the requirements of the National Labor Relations Act must be abrogated if the bank is to continue in operation. The Board, whose function is to administer the Act, will claim that if the bank should abrogate the contract it would be engaging in an unfair labor practice, subjecting it to the penalties of that statute.

In whom, under such conditions, does the paramount authority to regulate the business of banking rest? Is it in the Comptroller of the Currency and the other fiscal arms of the United States as a sovereign, to be exercised for the protection of the government, or did the Congress intend by this legislation to burden one of its most important instrumentalities? In construing the statute it is reasonable to assume that when the Congress said that the Labor Act should not apply to the United States, it meant to include without express provision to that effect, any agency and instrumentality of such character as a national bank.

We submit that whether or not an instrumentality of the United States is excepted as an employer under the Act, because the United States is excepted, should depend upon and be determined by the particular nature and character of the agency, and that any doubt should be resolved in favor of the exclusion where, to hold otherwise, would conflict with or defeat a more

important end and object of the Government in creating the national banks under the exercise of another power.

What we have last said on this subject adds emphasis to what we have said on the commerce question. In searching the Labor Act for its intent, and the banking laws for their intent, it seems to us that the two questions are interrelated. Since Congress did not, by appropriate provisions in the Labor Act, meet the obvious conflict between these laws, then we must believe that Congress did not conceive, in the first instance, that the activities of the national banks would be held to be commerce. We think that conclusion is the rational one and that the only decision which will adequately solve the problem is that the Board is without jurisdiction over national banks under the commerce clause.

The question is federal in character and should be decided by this Court.

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3. THE DUE PROCESS QUESTION.

During the trial petitioner applied to the Trial Examiner for a *subpoena duces tecum* to require the attendance of witnesses and the production of evidence in their possession. Several of the discharged employees of petitioner were under examination as witnesses for the Board and the main purpose of the application was to obtain as evidence written statements made to the Board by the complaining employees shortly after their discharge and two years or

more before the trial, on the ground that their prior written statements would contain a more accurate disclosure of the events bearing upon their discharge than their oral testimony more than two years later. (R. 1307-1321.) The written statements were material and admissible to test the credibility of the witnesses who made them and for purposes of impeachment. (*Wigmore on Evidence*, Second Edition, Sec. 17, et seq.)

The Board also had in its possession memoranda of discussions and correspondence with petitioner during the two year period prior to the filing of the complaint which indicated that the Board would be willing to drop the charge that the discharge of the automotive messengers was discriminatory if petitioner would re-employ one John E. Devine, whose complaint that his discharge was discriminatory was also on trial.[2] The application for the subpoena also sought a disclosure of this correspondence to test the good faith of the Board on issues made by petitioner's answer to the complaint. (R. 315-316.)

The Trial Examiner denied the application for the subpoena ruling as follows:

> "At this time the Trial Examiner is going to deny the respondent's right to a subpoena duces tecum, and is also going to strike from the answer the third and fourth further and separate answers of the respondent on the grounds that they are no defense to the action here involved." (R. 1321.)

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[2]The Trial Examiner found that John E. Devine was discriminatorily discharged and ordered his reinstatement. The Board reversed his finding and held that his discharge was for cause and was justified. (R. 173.)

The right of a litigant to produce witnesses and to offer evidence is fundamental and is a requirement of due process. The right of subpoena to compel the attendance of witnesses and to obtain the evidence is included in the requirement of due process.

In *Morgan v. U. S.*, 304 U. S. 1, 18, this Court said:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."

In *Donnelly Garment Co. v. N. L. R. B.*, 123 Fed. (2d) 215 (November 6, 1941), the Circuit Court of Appeals in the Eighth Circuit said:

> "That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. See St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73, 56 S. Ct. 720, 80 L. Ed. 1033; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 304-305, 57 S. Ct. 724, 81 L. Ed. 1093; Railroad Commission v. Pacific Gas & Electric Co., 302 U. S. 388, 393, 58 S. Ct. 334, 82 L. Ed. 319; Morgan v. United States, 304 U. S. 1, 14, 15, 58 S. Ct. 773, 999, 82 L. Ed. 1129. * * *
>
> "Our conclusion is that the petition of the Board for enforcement of the order under review must be denied. We think that the least that the Board can do, in order to cure the defects in its procedure caused by the failure of the Trial Examiner to receive admissible evidence, is to

vacate the order and the findings and conclusions upon which it is based; to accord to the petitioners an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner; and to receive and consider such evidence together with all other competent and material evidence in the record before making new findings and a new order.

"Because of lack of due process in the proceedings before the Board, the question of the sufficiency of the evidence to support the findings and order will not be considered. * * *"

It matters not that the witnesses, when they appear, may not testify, or that the evidence, when offered, may not be material. Admissibility and relevancy of the evidence are matters to be determined when the evidence is offered. In this case the Trial Examiner ruled the evidence out before it was offered and before he could have known its nature or effect. He went farther by denying process to obtain the evidence. It was a denial of due process of law and is a federal question which this Court alone may now consider and review.

Not only was the denial of the particular subpoena in this case a failure of due process, but the rule of the Board and its practice in relation to subpoenas is in itself discriminatory and lacking in the quality of equal rights and protection under the Constitution.

The Board automatically grants to its own agents and attorneys any subpoena requested, but demands and exacts an application therefor from any respondent, and a showing of what is sought to be proved and

its materiality. The Trial Examiner then undertakes to pass upon the materiality prior to the production of the witness or the documents which may be sought. (Article II, Section 21, Rules of Board.) This rule was condemned in *Inland Steel Co. v. National Labor Relations Board* (1940), 109 Fed. (2d) 9. In that case the Court held that the rule amounted to a substantial denial of due process and in speaking of the rule and its operation stated:

> "It also illustrates, in a minor fashion, what this record, as a whole, convincingly discloses—that is the danger of imposing upon a single agency the multiple duties of prosecutor, judge, jury and executioner. The further assumption that the ruling of the Trial Examiner was in compliance with the Board's rule, does not improve the situation—it merely shows *the rule itself is unfair and discriminatory.* * * *
>
> "It is further argued by the Board that petitioner's complaint is without merit because there is no showing that evidence favorable to it was excluded. This argument begs the question. *We are not now considering the extent to which petitioner was prejudiced, but whether it was, by such procedure, deprived of a substantial right, or whether the procedure employed placed it at a disadvantage in contrast with its opponent. It is also argued that the rule is reasonable because petitioner, under Section 10(e) of the Act, has a right to make application to this court to adduce additional evidence. This argument also is not tenable. Such provision has no bearing upon what we regard as an unreasonable and unfair restriction upon petitioner's right to the process of subpoena.*" (Emphasis supplied.)

The case is referred to and approved in a note in 53 *Harvard Law Review* (1940), 842, where it is stated:

> "Seemingly the NLRB rule castigated in this case did not meet the elementary test of fairness, since in a proceeding where the issue was largely the determination of important private rights, a burden was placed on one party to which the other was not subject. In contrast is the practice of the FTC, which, though also combining the multiple role of prosecutor-judge-jury, issues ordinary subpoenas freely on the sole condition that the party pay expenses, and is equally lenient in accepting averments of materiality and relevancy as conditions precedent to the issuance of subpoenas duces tecum upon defendant's written application. Even taking into account differences in the nature of the two agencies, the fact that the FTC has functioned since 1914 without being unduly encumbered by virtue of its liberal policy rebuts in part the NLRB's convention that the restrictive rule which now governs the issuance of its subpoenas is necessary for an efficient administration of its duties."

The question of due process inherent in this situation is also a federal question and should be reviewed by this Court.

The conflict between the decision of the Circuit Court of Appeals in the instant case and the decisions in the other Circuits also requires a review by this Court.

Wherefore, it is respectfully submitted that this Court should reconsider its denial of the petition for

a writ of certiorari herein and that the writ should issue on the grounds we have herein stated.

Dated, San Francisco, California,
May 10, 1943.

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CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the petitioner's counsel in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
May 10, 1943.

HERBERT W. ERSKINE,
Counsel for Petitioner.